SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 26, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, J.P., Sweeny, Catterson, DeGrasse, JJ.

4206 In re Develop Don't Destroy (Brooklyn), et al., Petitioners/Plaintiffs-Appellants, Index 104597/07

-against-

Urban Development Corporation doing business as Empire State Development Corporation, et al., Respondents/Defendants-Respondents.

Young Sommer Ward Ritzenberg, Baker & Moore, LLC, Albany (Jeffrey S. Baker of counsel), for appellants.

Bryan Cave LLP, New York (Philip E. Karmel of counsel), for Urban Development Corporation, respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Jeffrey L. Braun of counsel), for Forest City Ratner Companies, LLC, respondent.

Carter Ledyard & Milburn LLP, New York (Stephen L. Kass of counsel), for Metropolitan Transportation Authority, respondent.

Andrew M. Cuomo, Attorney General, New York (Peter Karanjia of counsel), for New York State Public Authorities Control Board, respondent.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered January 17, 2008, inter alia, dismissing the action challenging various administrative findings concerning the Atlantic Yards Arena Redevelopment Project, affirmed, without costs.

Respondent Forest City Ratner Companies (FCRC) has proposed to construct a vast and purportedly transformational mixed-use development on a 22-acre swath of real estate in Brooklyn extending eastward from the junction of Atlantic and Flatbush Avenues. "Atlantic Yards," as the project is called by reason of its planned situation atop of and in blocks adjacent to the rail yards serving the LIRR Atlantic Terminal, is to include 16 high rise structures and a sports arena. Six-thousand four-hundred thirty housing units, more than a third of which will be "affordable," are to be accommodated in the project's towers along with hundreds of thousands of square feet of space dedicated to commercial purposes. Also to be included within the project footprint is an 18,000-seat arena, intended to serve, inter alia, as the new home of the Nets, the National Basketball Association franchise now situated in New Jersey, which would, upon its move to the new arena, become Brooklyn's first major professional sports team since the Dodgers left the borough for Los Angeles in 1957. The proposed arena's design is by the eminent American architect, Frank Gehry, and the eight acres of open space to be situated amid the arena and the project's other structures are to be laid out according to the plans of the highly regarded landscape architect, Laurie Olin. Other promised benefits of the project include improved access to the major transit hub already located at its site and construction of a

new, covered LIRR rail yard.

The project has been shepherded through its preconstruction phases and otherwise promoted by respondent New York State Urban Development Corporation, doing business as the Empire State Development Corporation (ESDC). In addition to acting as the "lead agency" in connection with the project's environmental review (*see generally* 6 NYCRR 617.2[u]), the ESDC has obtained authorization from the State Legislature and respondent New York State Public Authorities Control Board (PACB) to finance a portion of the project through a bond issue. It has also made certain findings simultaneously placing the project within its purview and exempting it from compliance with otherwise applicable City zoning and land use laws (*see* McKinney's Uncons Laws of NY § 6266[3] [Urban Development Corporation Act § 16(3), as added by L 1968, ch 174 § 1], [hereinafter cited as Uncons Laws § 6266(3) or UDCA § 6266(3)]), namely, that the project qualifies as a "land use improvement project" pursuant to UDCA 6260(c) and 6253(6)(c), based upon blight at its site, and that the project's proposed arena qualifies under UDCA 6260(d) and 6253(6)(d) as a "civic project." Also, in collateral proceedings the ESDC has exercised its condemnation power (*see* UDCA 6255[7]) on the project's behalf (*see Matter of Anderson v New York State Urban Dev. Corp.*, 45 AD3d 583 [2007], *lv denied* 10 NY3d 710 [2008]) and has defended that exercise against constitutional

challenge (*see Goldstein v Pataki*, 516 F3d 50 [2008], *cert denied* __ US __, 128 S Ct 2964 [2008]).

The project footprint extends over eight city blocks, the majority of which are now occupied by subgrade rail yards lying within an area that has, since 1968, been designated the Atlantic Terminal Urban Renewal Area (ATURA). There is no dispute that this previously designated area is in fact blighted and that the proposed development, insofar as it affects this area, has been properly deemed a "land use improvement project." Adjoining the rail cut on its southern side, however, lie two full blocks and part of a third that are not within ATURA but are within the FCRC project footprint. These non-ATURA project blocks, although never previously earmarked for urban renewal, have, since the announcement of the project, been found blighted by the ESDC and thus proper for development under the ESDC's auspices, along with the contiguous rail yard blocks, as a "land use improvement project."

While the principal focus of this appeal would appear to be upon the propriety of the ESDC's UDCA findings that the non-ATURA project blocks are blighted and that the proposed arena qualifies as a "civic project," petitioners in this hybrid article 78/declaratory judgment action have also raised numerous challenges to the adequacy of respondents' compliance with the State Environmental Quality Review Act (SEQRA), several of which

survive for our review. Petitioners urge (1) that the PACB determination approving the ESDC's financial participation in the project was improper in the absence of environmental findings by the PACB; (2) that the ESDC's environmental review was deficient due to its failure to address the risk of a terrorist attack upon the project; (3) that the "build years" used by the ESDC in its Environmental Impact Statement (EIS) were irrational and skewed the ensuing analysis of the project's environmental effects; and (4) that because the ESDC failed to study and give due consideration to real estate market trends in the non-ATURA project area, it could not have adequately discharged its statutory obligation to consider alternatives to the proposed project not involving that area's development as part of an urban renewal project. We address these SEQRA claims first and then turn to the claims arising under the UDCA.

Ordinarily, under SEQRA an involved agency must, when exercising discretion to approve an action for which an EIS is required, make certain statutorily enumerated environmental findings based on the EIS (*see* ECL 8-0109[8]; 6 NYCRR 617.11[d]). This requirement, however, is logically premised upon the relevance of the EIS to the decision the agency is called upon to make. Accordingly, where the decision, although discretionary, is governed by criteria unrelated to the environmental concerns addressed in an EIS, environmental findings based on the EIS are

unnecessary as it would be pointless to mandate reliance on an EIS in the interest of informed decision-making in circumstances where the EIS is by hypothesis irrelevant to and cannot inform the decision to be made (*see Incorporated Vil. of Atl. Beach v Gavalas*, 81 NY2d 322, 326 [1993]). Here, the PACB's approval of the ESDC's financial participation in the project was governed by closely drawn statutory criteria specifically relevant to a distinct, statutorily prescribed inquiry, i.e., whether "there [were] commitments of funds sufficient to finance the acquisition and construction" of the project (Public Authorities Law § 51[3]). Plainly, this singular, discrete financial inquiry would not have been usefully informed by the EIS's account of the project's environmental effect and, accordingly, did not trigger an obligation to make environmental findings pursuant to ECL 8-0109(8).

Petitioners' remaining SEQRA claims allege substantive deficiencies in the project's EIS. However, our power to review the substantive adequacy of an EIS is extremely limited. It is by now a familiar refrain that we may not disturb an agency determination as substantively flawed unless it is affected by an error of law, arbitrary and capricious, or constitutes an abuse of discretion (*see* CPLR 7803[3]; *Akpan v Koch*, 75 NY2d 561, 570 [1990]; *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]), and, in the context of reviewing a lead

agency's SEQRA determination, this generally expressed limitation has been understood to confine judicial inquiry to a "review [of] the record to determine whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" (*id.* at 417 [internal quotation marks and citations omitted]). In assessing whether an agency has met its substantive SEQRA obligations, the appropriate judicial focus is not upon the agency's ultimate judgments but upon the deliberative process by which they were reached, and the touchstone is reasonableness. "Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA. The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal" (*Jackson*, 67 NY2d at 417 [internal quotation marks and citations omitted]).

While the 3500-page final EIS approved by the ESDC in connection with the proposed project provides impressively detailed analyses of the project's anticipated environmental impacts in 16 separately identified areas, petitioners contend that it fails to identify and take a "hard look" at a relevant area of environmental concern because it does not address the risk of a terrorist incident at the project site. But SEQRA

contains no provision expressly requiring an EIS to address the risk of terrorism and, indeed, it would not appear that terrorism may ordinarily be viewed as an "environmental impact *of* [a] proposed action" (ECL 8-0109[2][b] [emphasis added]) within the statute's purview. We do not, however, find it necessary to determine whether consideration of the prospect of terrorism may ever lie within the scope of the environmental review mandated by the statute, and leave open the possibility that there may be a case in which a proposed action will by its very nature present a significantly elevated risk of terrorism and consequent environmental detriment, i.e., a case in which the risk and its potential adverse environmental impacts may in a real sense be said to stem from the action itself rather than an independent ambient source (*see e.g. San Luis Obispo Mothers for Peace v Nuclear Regulatory Commn.*, 449 F3d 1016 [2006], *cert denied 549* US 1124 [2007]). For now, it suffices to observe that the project at issue does not pose extraordinary inherent risks; it does not involve the siting of a nuclear storage facility (*id.*), or a biological weapons laboratory (*Tri-Valley Cares v Department of Energy*, 203 Fed Appx 105, 107 [2006]), or any comparably risk-elevating action, but rather the creation of a venue dedicated to routine residential, commercial and recreational purposes (*see* 6 NYCRR 617.9[b][6]). These latter purposes, even when realized in the form of a major urban development situated

at a pre-existing transit hub, do not so clearly increase the risk of terrorism, much less of terror-induced environmental harm, as to render the lead agency's determination not to address terrorism as an environmental impact *of* the proposed action unreasonable as a matter of law.

To be sure, tragic experience counsels that even venues designed to accommodate relatively benign uses may become terrorist targets and that security must be a concern in the planning of any public project, particularly one concentrating large numbers of people. We have recently affirmed the obligation of landlords,under tort law, to take reasonable measures to secure their premises against actual reasonably foreseeable risks of terrorist predation (*see Nash v Port Auth. of N.Y. & N.J.*, 51 AD3d 337 [2008]). At issue here, however, is not the extent of a landlord's common-law security obligation, but the scope of the lead agency's statutory planning obligation publicly to identify the significant environmental impacts of a proposed action, and, ordinarily, terrorism does not fall under that latter rubric.

Turning now to the "build year" issue, it is petitioners' contention that the build years, i.e., the time periods by which the phases of the project were predicted to be substantially operational, were intentionally underestimated in the project EIS and that the EIS's disclosure of the project's environmental

impacts was consequently fatally skewed. The record, however, discloses that in selecting the build years to be used in the EIS, the lead agency did not arbitrarily select a build year it found favorable but relied upon the detailed construction schedules of the project's highly experienced general contractor and upon the opinions of its own consultants and an independent contractor. It is, of course, possible that the lengths of the projected build-out periods (4 years for the first phase of the project, including the arena, and 10 years for the remaining elements) were underestimated, but the ultimate accuracy of the estimates is neither within our competence to judge nor dispositive of the issue properly before us, which is simply whether the lead agency's selection of build dates based on its independent review of the extensive construction scheduling data obtained from the project contractor may be deemed irrational or arbitrary and capricious (*see Akpan*, 75 NY2d at 572-573), and it may not. The build dates having been rationally selected, there can be no viable legal claim that the EIS was vitiated simply by their use. Indeed, we have, in rejecting a similar challenge to an EIS, held that reliance on a particular build date, even if inaccurate, will not affect the validity of the basic data utilized in an EIS (*Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Council of City of N.Y.*, 214 AD2d 335, 337 [1995], *lv denied* 87 NY2d 802 [1995]).

Petitioners' final appellate claim of substantive inadequacy in the EIS focuses upon the EIS's consideration of alternatives to the proposed action. Petitioners do not contend that the lead agency wholly failed to discharge its statutory obligation to consider feasible alternatives to the FCRC project (*see* ECL 8-0109[2][d]), for the EIS in fact contains a separately headed, highly detailed 83-page section discussing various alternatives, including one involving no action and another contemplating a lower density, arenaless development not encompassing the non-ATURA project blocks. Petitioners' contention is rather that the lead agency did not take into account in the EIS prevailing real estate trends, particularly as they affected and had become manifest in the non-ATURA project area at the time of the project's announcement, and thus could not have reasonably concluded that the proposed project was to be preferred to its alternatives for its purportedly unique capacity to alleviate blight in the non-ATURA blocks. This argument, however, necessarily supposes that the lead agency's judgment as to the relative desirability of the proposed project must have turned upon the project's purported efficacy as a means of improving the non-ATURA blocks. It is, however, clear from the EIS that the lead agency's rationale for preferring the proposed project was not so singularly grounded. The proposed project, in distinction to the alternatives preferred by petitioners, included an

architecturally distinguished arena that would house a major professional sports franchise, an elaborate new subway entrance, a new and improved LIRR rail yard, improved pedestrian and bicycle linkages connecting the project and the surrounding neighborhoods on the north-south axis, an on-site stormwater drainage system, and eight acres of open space landscaped by Laurie Olin. It also made provision for significantly more affordable housing than would have been developed under alternative scenarios, and, by reason of its scale and range of uses, promised economic and fiscal benefits exceeding those expected to be generated under the other plans. To be sure, as the EIS discloses, there were more adverse impacts associated with the proposed project than with its less ambitious alternatives, but, on balance, there is no tenable argument that the lead agency's preference for the FCRC project, arrived at after an evidently conscientious weighing of alternatives, was not rationally and sufficiently based on the project's distinctive constellation of otherwise unattainable benefits. Certainly, the lead agency did not in this case exceed the "considerable latitude" afforded it under SEQRA to evaluate environmental effects and choose among alternatives (*Jackson*, 67 NY2d at 417).

Petitioners also challenge the designation of the non-ATURA project area as a UDCA "land use improvement project" on the

ground that gentrification of the area had progressed appreciably due to market forces and would have run its course if permitted to do so. In this context, however, the thrust of the argument is not that a feasible alternative to the proposed action was unreasonably rejected by the ESDC, but more fundamentally that the ESDC had no legitimate role to play with respect to the blocks in question since they are not in fact "substandard and insanitary" and accordingly not a proper subject of an ESDC sponsored "plan or undertaking for the[ir] clearance, replanning, reconstruction and rehabilitation" (UCDA 6253[6][c]).

Before considering this issue and petitioners' challenge to the other proffered justification for the ESDC's sponsorship of proposed project, i.e., that it is a "civic project" within the meaning of UDCA 6253(6)(d), we note that the constitutional sufficiency of the public purposes upon which the ESDC's involvement in the Atlantic Yards project as a condemnor was predicated has been the subject of now completed litigation. In *Goldstein v Pataki* (516 F3d 50 [2008], *supra*), the Second Circuit Court of Appeals held that the ESDC's exercise of its eminent domain power to take private property for the project, and specifically to take private property within the non-ATURA project blocks, was supported by the project's rational relation to "several classic public uses whose objective basis is not in doubt" (*id.* at 63). Among these "classic public uses" were the

alleviation of blight in both the ATURA and non-ATURA project areas and the provision of a sporting arena (*id.* at 55, 58-59, 62). In rejecting the plaintiffs' claim that these purposes were under the specific circumstances presented inadequate to support the ESDC's exercise of its eminent domain power, indeed that they amounted to no more than pretexts for bestowing a private benefit upon FCRC, the court, citing numerous authorities, but most notably *Berman v Parker* (348 US 26 [1954]) and *Hawaii Hous. Auth. v Midkiff* (467 US 229 [1984]), emphasized that it is an essentially legislative, and not a judicial function to define the public agenda, and, accordingly, that in all but the most extraordinary cases - those in which there is no conceivable public purpose to be served - courts reviewing the adequacy of a use advanced in support of an exercise of the eminent domain power are bound to defer to the public purpose findings of the legislature and its agencies (*Goldstein,* 516 F3d at 57-60). In this last connection, the court specifically rejected the contention that the findings of the ESDC were, by reason of its status as a public benefit corporation, non-legislative and thus undeserving of deference, holding instead that, in making the findings upon which its exercise of the takings power was to rest, most particularly those contained in its Blight Study, the ESDC acted as an agent of the Legislature (*id.* at 60). In any case, it was, according to the court, undisputed that over half

the project area was in fact blighted, and that there was significant blight in the Takings Area (i.e., the non-ATURA project area) amid which the plaintiffs' properties were situated. That the plaintiffs' properties were not themselves blighted did not require alteration of the project footprint since "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis - lot by lot building by building" (*id.* quoting *Berman*, 348 US at 35), and "once it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area" (*id.*, quoting *In re G. & A. Books, Inc.*, 770 F2d 288, 297 [2d Cir 1985]).

While petitioners' challenges to the ESDC's findings authorizing the project as one for the public purposes of land use improvement (UDCA 6260[c]) and the provision of civic facilities (UDCA 6260[d]) are not legally precluded by *Goldstein*, post-*Goldstein* petitioners are reduced to arguing that although the uses of the project are sufficiently public to support a justly compensated taking of property within the project footprint by the ESDC through its power of eminent domain, the identical uses will not support redevelopment of the very same property pursuant to the UDCA. This posited, evidently anomalous disparity finds no support in the cases, which, as a matter of basic constitutional design, counsel extreme judicial

circumspection in assessing the adequacy of the public purposes advanced by the legislature and its agencies in support of government actions falling, even arguably, within the state's police power. As Justice Douglas wrote in *Berman*, "[t]he definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive" (348 US at 32). This admonition has been strictly followed and nowhere more so than in cases where the purpose advanced for the proposed governmental action is, as it was in *Berman* and is here, that of alleviating or preventing "substandard and insanitary" conditions, or "blight."

These terms, whose potentially capacious reference has not been meaningfully reduced by statutory definition (*see e.g.* UDCA 6253[12]), are to be understood "liberally" so as not to unduly constrict the governmental prerogative to take measures directed at improving the urban environment (*see Yonkers Community Dev. Agency v Morris*, 37 NY2d 478, 481-484 [1975]). This definitional check upon judicial revision of determinations substantially and appropriately committed to the policy-making branches of government is complemented and reinforced by a standard of review that may with great understatement be described as lenient:

"When [the agencies to which the initial blight determination has been committed] have made their finding, not corruptly or irrationally or baselessly, there is nothing for the courts to do about it, unless every act and decision of other departments of government is subject to revision by the courts" (*Kaskel v Impellitteri*, 306 NY 73, 78 [1953], *cert denied* 347 US 934 [1954]).

Contrary to petitioners' argument, there exists no ground to suppose that this standard, compelling deference to agency blight findings when they are not utterly without rational basis, is applicable only in the context of evaluating whether there is a sufficient public use to support condemnation. Condemnation is not an end in itself, but merely an instrument for the achievement of a social purpose, here urban redevelopment (*see Berman*, 348 US at 33; *Rosenthal & Rosenthal, Inc. v New York State Urban Dev. Corp.*, 771 F2d 44, 46 [1985], *cert denied* 475 US 1018 [1986]). Courts, even in the condemnation context, have understood that the issue before them in determining whether property was blighted was not simply whether it could be condemned and cleared but ultimately whether by reason of blight it "qualifie[d] for renewal" (*Yonkers Community Dev. Agency*, 37 NY2d at 484; *and see Kaskel*, 306 NY at 79 [framing the inquiry in the condemnation proceeding as whether the property at issue was

"so substandard or insanitary, or both, as to justify *clearance and redevelopment* under the law" (emphasis added)]). The essential purpose of the blight finding in connection with condemnation, i.e., to qualify property for urban renewal, is not different under the ESDC's enabling statute (UDCA 6260), and, accordingly, the adequacy of blight findings in the two contexts should not be judged by different standards. What is fundamentally at issue in both contexts is the extent of the government's unitary power to define, and act in pursuance of a public purpose. It makes no difference that the agency through which the government has here acted, the ESDC, is organized as a public benefit corporation. It is nonetheless a "governmental agency of the state, constituting a political subdivision [thereof]" (UDCA 6254[1]) and, as such, its public purpose findings within the scope of its legislative authorization are entitled to extraordinary judicial deference (*see Kaskel*, 306 NY at 78-80; *and see Goldstein*, 516 F3d at 60; *Jackson*, 67 NY2d at 424-425 [1986]; *Matter of West 41st St. Realty v New York State Urban Dev. Corp.*, 298 AD2d 1, 6-7 [2002], *appeal dismissed* 98 NY2d 727 [2002], *cert denied* 537 US 1191 [2003]; *East Thirteenth St. Community Assn. v New York State Urban Dev. Corp.*, 189 AD2d 352, 359 [1993], *affd* 84 NY2d 287 [1994]). We have, of course, employed this deferential standard, not only in the condemnation context, but also in reviewing blight findings made by the ESDC

pursuant to UDCA 6260(c) (*see Tribeca Community Assn. v New York State Urban Dev. Corp.*, 200 AD2d 536, 537 [1994], *lv denied* 84 NY2d 805 [1994]), and in judging the the adequacy of the blight predicate for an urban renewal designation pursuant to article 15 of the General Municipal Law (*see Jo & Wo Realty Corp. v City of New York*, 157 AD2d 205, 217-218 [1990], *affd on other grounds* 76 NY2d 962 [1990]).

Petitioners naturally seek to bring their claims within the very narrow circumstances hypothetically reserved by *Kaskel* for judicial scrutiny, i.e., where an area's physical condition "might be such that it would be irrational and baseless to call it substandard or insanitary" (306 NY at 80). However, the facts are very much against them. Indeed, this case is in significant respects very much like *Kaskel*, in which blight findings were upheld for an area including the part of Columbus Circle upon which the Coliseum was to be erected. Like petitioners, Kaskel maintained that the proposed development encompassed areas which, although contiguous, were of distinctly different character, one displaying indicia of blight and the other, the area on Columbus Circle, being relatively free of such conditions (*id.* at 82-83 [Van Voorhis J., dissenting]). Also, similar to the argument petitioners now make, Kaskel maintained that the allegedly distinct, non-blighted Columbus Circle area had been made part of the proposed urban renewal project area, not because it was

blighted but because it was coveted by the developer as a site for the Coliseum, which the developer wished for financial reasons to erect as an element of an urban renewal project. The Court rejected this argument with language dispositive of petitioners' present contentions as to the propriety of the ESDC's blight finding respecting the non-ATURA project blocks:

> "There is no real question of fact here since the details as to age, condition and present use of the properties involved are undisputed and indisputable, as shown by the exhibits. Plaintiff does not dispute with defendants as to the condition of these properties or of the whole area. He is simply opposing his opinion and his judgment to that of public officials, on a matter which must necessarily be one of opinion or judgment, that is, as to whether a specified area is so substandard or insanitary, or both, as to justify clearance and redevelopment under the law. It is not seriously contended by anyone that, for an area to be subject to those laws, every single building therein must be below civilized standards. The statute (and the Constitution), like other similar laws, contemplates that clearing and redevelopment will be of an entire area, not of a separate parcel, and, surely, such statutes would not be very useful if limited to areas where every single building is substandard. A glance at the photographs, attached to the city's affidavit on these motions, shows that a considerable number of buildings in this area are, on a mere external inspection, below modern standards because of their age, obsolescence and decay. The other exhibits confirm this. Therefore, the question here is not whether certain public officials have acted arbitrarily

> or unwisely in coming to a certain conclusion. Here we have a naked question of legality, that is, of power, and the particular power to make a determination on this matter of judgment has been conferred by statute on these defendants" (*id.* at 79-80).

Here too there is no real issue as to the actual condition of the properties at issue or of the whole area; it is conceded that over half the project area is blighted within the meaning of the statute and, although petitioners dispute whether the non-ATURA area may be characterized as blighted, the existence of circumstances indicative of "substandard and insanitary" conditions in that area is extensively documented, photographically and otherwise, in the ESDC's lot-by-lot Blight Study. While it is possible to disagree with the agency's conclusion that the area at issue is blighted, and to argue that the blight designation is not warranted by the area's character and potential, on this record, all that is involved is a difference of opinion. In such a case, it does not matter whether we would be inclined to agree with petitioners; we are bound to defer to the agency to which the determination has been legislatively committed. This is not the "conceivable" case hypothesized by *Kaskel* in which the area in question so absolutely defies description as "substandard and insanitary" as to render a blight designation susceptible of characterization as irrational or baseless, and thus vulnerable to judicial

disturbance. Rather, this presents "a naked question of legality" that must be resolved in respondent agency's favor. The issue posed is not which of the parties has more persuasively characterized the area in question, but whether there was any basis at all for the exercise by the agency of the legislatively conferred power to make a blight finding, and plainly there was.

In the many years since *Kaskel*, agency blight findings have been found deficient in this State only where they were utterly unsupported (*see e.g. Yonkers Community Dev. Agency*, 37 NY2d at 484), and there has been no case in which the condition of an area has been deemed sufficiently at odds with an agency blight finding to raise a factual issue as to whether the agency exceeded its authority in making the finding. This is not because the limits of the blight concept have been untested. Indeed, if ever a claim of blight challenged one's common-sense understanding of the term it was in *Jo & Wo Realty Corp. v City of New York* (157 AD2d 205 [1990], *supra*) in which the City urged that the Coliseum site at Columbus Circle (now the location of the Time Warner Building) - undoubtedly, even at the time of the litigation, one of the most valuable pieces of real estate in the City, bordering upon the very exclusive southwestern corner of Central Park - was blighted and thus appropriate for designation as an urban renewal site. This Court, however, citing *Kaskel*, and accepting the City's contention that the site was outmoded,

underbuilt and insufficiently utilized, found the proposed designation proper (*Jo & Wo Realty Corp.* at 218) notwithstanding the site's obvious, indisputable potential for private development. The point to be made is that "blight" has proved over time to be a highly malleable and elastic concept capable of enormously diverse application. This is not in the main attributable to the ingenuity of consultants eager to please the developers who pay their bills, but because the concept, within the field of its likely use, is more facilitative than limiting.

Petitioners' final contention is that the ESDC was without power to authorize the project as a "civic project" pursuant to UDCA 6260(d) based on FCRC's proposed construction of a professional sports arena within the project footprint. As is here relevant, the statute conditions civic project designation upon findings that there is a need in the area in which the project is located for a recreational facility (UDCA 6260[d][1]), i.e., that there is a public purpose for the proposed facility, and that the need will be met by "a building for . . . recreational . . . or other civic purposes" (UDCA 6260[d][2]). Although it is now conceded that the proposed arena will serve a recreational purpose, petitioners urge that the purpose is not sufficiently civic to justify the arena's designation as a "civic project." Here, petitioners emphasize that the arena will be leased on a long-term basis, and provide financial benefit to

private parties. However, it is established that a sports arena, even one privately operated for profit, may serve a public purpose (*Murphy v Erie County*, 28 NY2d 80 [1971]), and, in any event, the agency findings to the effect that the proposed arena will serve a public purpose by providing a needed recreational venue in the area of the project are for reasons already discussed largely beyond our review; they are neither irrational nor baseless. We perceive no support for petitioners' contentions that the agency was not permitted under its enabling legislation to authorize construction of the proposed arena as a "civic project," or that such a project could be authorized only by a separate act of the Legislature. The plain language of the existing enabling enactment authorized the agency to do as it did.

While we do not agree with petitioners' legal arguments, we understand those arguments to be made largely as proxies for very legitimate concerns as to the effect of a project of such scale upon the face and social fabric of the area in which it is to be put. Those concerns, however, have relatively little to do with the project's legality and nearly everything to do with its socio-economic and aesthetic desirability, matters upon which we may not pass. To the extent that the fate of this multi-billion dollar project remains, in an increasingly forbidding economy, a matter of social and political volition, the controlling

judgments as to its merits are the province of the policy-making branches of government, not the courts.

All concur except Catterson, J. who concurs in a separate memorandum as follows:

CATTERSON, J. (concurring)

Because I believe that the New York Urban Development Corporation Act (McKinney's Uncons. Laws of N.Y. § 6251 et seq.) (hereinafter referred to as "UDCA") is ultimately being used as a tool of the developer to displace and destroy neighborhoods that are "underutilized," I write separately. I recognize that long-standing and substantial precedent requires a high level of deference to the Empire State Development Corporation's (hereinafter referred to as "ESDC") finding of blight. Reluctantly, therefore I am compelled to accept the majority's conclusion that there is sufficient evidence of "blight" in the record under this standard of review. However, I reject the majority's core reasoning, that a perfunctory "blight study" performed years after the conception of a vast development project should serve as the rational basis for a determination that a neighborhood is indeed blighted.

The Atlantic Yards Arena Redevelopment Project (hereinafter referred to as "the Project") covers 22 acres in the Prospect Heights neighborhood of Brooklyn. Defendant Forest City Ratner Companies LLC (hereinafter referred to as "FCRC") is the developer of the Project, the largest single-developer project in New York City history. Five of the eight city blocks encompassed by the Project are within the Atlantic Terminal Urban Renewal

Area (hereinafter referred to as the "ATURA"), including eight acres owned by MTA (hereinafter referred to as "Vanderbilt Yards") for use as a below-grade rail yard. The remaining three blocks, 1127, 1128 and 1129, comprise almost 40 percent of the Project footprint and are not included within the ATURA (hereinafter referred to as "non-ATURA"). These three blocks are privately-owned contiguous blocks located on the south side of Pacific Street, directly across from the Vanderbilt Yards.

FCRC purchased large portions of these blocks over the past several years. Now, co-defendant ESDC, a quasi-governmental organization, has labeled the whole area "blighted" and intends taking the lots not owned by FCRC by eminent domain.

In 1968, the ATURA was established by the City of New York to facilitate the redevelopment of an admittedly blighted area of Prospect Heights in Brooklyn. The redevelopment plan for this area has undergone several revisions, the most recent in 2004. In all of those years, the ATURA area has only been expanded once. Several redevelopment projects have been undertaken within the ATURA since its inception and the Vanderbilt Yards are the primary portion of the ATURA that remain undeveloped.

In December 2003, Mayor Bloomberg, FCRC's principal, Bruce Ratner, and other notables publicly announced that the New Jersey Nets professional basketball team would be purchased by Ratner and moved to Brooklyn to a new arena proposed as part of a multi-

use development project.

Progress through the various bureaucratic processes was facilitated by the State through ESDC, a non-elected, quasi-public corporation. The first memorialization of the cooperation between the entities was a Memorandum of Understanding executed on February 18, 2005 between New York City, the ESDC and FCRC. That same day, and without first issuing a request for proposals, the MTA entered into an agreement with FCRC giving FCRC rights to develop above the MTA's Vanderbilt Yards. Three months later, the MTA belatedly issued a Request for Proposals (hereinafter referred to as "RFP"). Three months after that, the MTA accepted FCRC's bid.

On September 16, 2005, just two days after the MTA's acceptance of FCRC's bid, the ESDC designated itself as the lead agency for the Project under the State Environmental Quality Review Act (hereinafter referred to as "SEQRA") and noted for the first time that this project was intended to cure "blight" in the privately owned non-ATURA blocks at issue. Over the next year or so, FCRC and related entities purchased many properties in the Project area. These FCRC properties remained largely vacant as the ESDC conducted the scoping process required under SEQRA. This included an Economic Impact Statement and a "Blight Study." The documents necessary to these studies were prepared either directly by or with the close assistance of AKRF, Inc.

(hereinafter referred to as "AKRF"), its perennial environmental consultant.[1]

On March 31, 2006, the final scoping document was released by the ESDC. By May, FCRC and its subsidiaries had acquired a majority of the properties in the three non-ATURA blocks in the Project area. AKRF's "Blight Study" was completed, signed by ESDC, and published with the General Project Plan (hereinafter referred to as the "Plan") on July 18, 2006. Six days later, on July 24, the Plan was released along with a Draft Environmental Impact Statement (hereinafter referred to as the "DEIS"). Among the 3,000-plus pages, there was a notice of public hearing to be held on August 23, 2006 and a notice that the ESDC would accept written comments until September 22, 2006.

The public hearing held on August 23, 2006, drew a crowd of hundreds of local residents. Many were denied access due to overcrowding. The hearing ran three hours over time, and subsequently two community forums were held on September 12 and 18, 2006.

Despite substantial adverse public response to the findings reported in the DEIS and the Plan, a Final Environmental Impact

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[1]It should be noted that AKRF and the ESDC were recently criticized by this Court for their failure to maintain a relationship separate and distinct from the developer in another gargantuan project. See Matter of Tuck-It-Away Assoc. v. Empire State Dev. Corp., 54 A.D.3d 154, 861 N.Y.S.2d 51 (2008)(Catterson, J.).

Statement (hereinafter referred to as the "FEIS") was accepted by the ESDC's Board of Directors on November 15, 2006. Within days, however, it was discovered that the FEIS had erroneously omitted all of the written comments submitted by members of the community; under SEQRA these were required to be addressed.

A new DEIS was prepared and accepted by the ESDC Board on November 27, 2006. On December 8, 2006, AKRF provided the ESDC with a memorandum addressing the written comments received by the public on the Blight Study. Sparing not a minute for reflection, the ESDC reviewed the memorandum and approved its SEQRA findings and the Plan that same day. On December 13, 2006, the MTA's Board of Directors moved with equal alacrity and approved a "summary" of the SEQRA findings. On December 20, 2006, the New York Public Authorities Control Board also approved the Project.

On April 5, 2007, the petitioners commenced an article 78 proceeding and action for declaratory judgment by order to show cause, seeking a temporary and preliminary injunction of FCRC's demolition and construction of the Project. On April 20, 2007, they were denied a temporary restraining order, and on January 11, 2008, the court below denied the motion for a preliminary injunction. In this article 78 proceeding, the petitioners challenge, inter alia, ESDC's reliance on AKRF's "Blight Study" to support a determination of blight in the non-ATURA blocks.

Judicial review of this administrative determination is

limited to consideration of whether or not that determination is rationally supported. AKRF's report must be viewed as a whole to determine whether ESDC had a rational basis for accepting the findings of blight; namely, whether the blight finding is supported by evidence of record. The UDCA circumscribes the power of the ESDC and limits ESDC to certain enumerated types of development projects. McKinney's Uncons. Laws of N.Y. § 6253(6)(a) - (c); § 6254. The ESDC, pursuant to the UDCA, classified the subject project as a land use improvement project, which is:

> "A plan or undertaking for the clearance, replanning, reconstruction and rehabilitation or a combination of these and other methods, of a substandard and insanitary area, and for recreational or other facilities incidental or appurtenant thereto, pursuant to and in accordance with article eighteen of the constitution and this act. The terms 'clearance, replanning, reconstruction and rehabilitation' shall include renewal, redevelopment, conservation, restoration or improvement or any combination thereof as well as the testing and reporting of methods and techniques for the arrest, prevention and elimination of slums and blight." § 6253(6)(c).

The term "substandard or insanitary area" has a specific meaning under the UDCA:

> "a slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area, whether residential, non-residential, commercial, industrial, vacant or land in highways, waterways, railway and subway tracks and yards, bridge and tunnel approaches and entrances or other similar facilities." § 6253(12).

Additionally, the ESDC must make a two-fold determination:

> "That the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming

> a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality." § 6260(c)(1).

There is no dispute that the MTA allowed the portion of the Project footprint which it owns, the Vanderbilt Yards, to deteriorate into a substandard, unsanitary, and blighted condition. Furthermore, there is no dispute the blight designation for that area was made decades before the Project was conceived. That portion of the Project area falls squarely within the bounds of the ATURA. However, the important question presented by this appeal is whether there is a rational view of the evidence which supports the ESDC's determination, that the non-ATURA portion of the Project area - Tax Blocks 1127, 1128, and 1129, which lie south of Pacific Street - was "substandard or insanitary" under the UDCA.

In my view, any determination that these blocks were substandard or insanitary should properly be based on a snapshot of the conditions that prevailed at the time that the Project was announced by FCRC in 2003. Any blight study that does not reflect this temporal limitation would necessarily allow the mere announcement of the massive project to predetermine the outcome of the study. On this point, I believe that the petitioners argue persuasively that any proposed or intended development in these blocks such as the Project would curtail any other private development; and that no new development would occur on property

that might be subject to the broad powers of condemnation as wielded by a coalition of the ESDC and FCRC.

The ESDC purported to set out the factors that its consultant AKRF should consider in its blight study. In its contract with AKRF, the ESDC stated that:

> "The characteristics of blight can include, but are not limited to: physical deficiencies (insanitary/substandard building conditions, building/housing/fire code violations, site vacancy or underutilization), economic deficience (building vacancies, low rents, high rental turnovers) or other deficiencies (incompatible land uses, multiple ownerships that hamper assemblage of properties, traffic congestions, pollution). Taken together, these characteristics may demonstrate that the area under study is substandard, insanitary, or deteriorating."

The contract also provided specific criteria and methodology to be used in preparation of the study:

> "Using currently available data and information from ESDC and DCP, and if necessary a supplemental survey, we will document and record patterns of ownership, utilization of the sites, land use, zoning, and physical conditions for the affected area. This work will also draw on information being gathered for the land use task being performed for the EIS effort, including maps and other graphical data.
>
> "More specifically, the blight study will include the following tasks:
>
> "A. Determine the study area for analysis of blight conditions and prepare and draft criteria that will be used as the basis for the blight study area, in consultation with state and city agencies, including ESDC and DCP.
>
> "B. Document blighted conditions, including the following:
>
> - "• Analyze residential and commercial rents on the project site and within the study areas;
> - "• Analyze assessed value trends on the project site, and compare to sample blocks with comparable uses

in the study area, such as the Atlantic Center;

- Describe residential and commercial vacancy trends;

- Compare current economic activity on the project site, such as direct and indirect employment, with relevant surrounding sites;

- Review New York City Police Department (NYPD) crime statistics for the affected area; and

- Identify physical conditions, including New York City Department of Buildings (DOB) building code and other pertinent violations (e.g. New York City Fire Department, Department of Environmental Projection, etc.), and determine Certificate of Occupancy compliance on the project site.

"C. Identify/estimate the public benefit generated by the proposed project, including estimates of construction period and operating period, including direct and indirect employment, wages and salaries, and non-real estate taxes generated. This task assumes that an economic and fiscal impact analysis has been previously performed by AKRF for FCR Sports, LLC."

The blight study, however, seamlessly combined the ATURA area with the three non-ATURA city blocks. The "executive summary" to the blight study, in a less than admirable sleight of hand, sets out the goals for the ATURA that were articulated in 2004. That study succinctly captures the respondents' view of the entire project and this litigation. The summary begins with observations limited to the ATURA and the City's most recent plan for the ATURA; the 10th Amendment to a plan originally drafted in 1968:

- Redevelop the Area in a comprehensive manner, removing blight and maximizing appropriate land use.

"• Remove or rehabilitate substandard and insanitary structures.

"• Remove impediments to land assemblage and orderly development.

"• Strengthen the tax base of the City by encouraging development and employment opportunities in the Area.

"• Provide new housing of high quality and/or rehabilitated housing of upgraded quality.

"• Provide appropriate community facilities, parks and recreational uses, retail shopping, public parking, and private parking.

"• Provide a stable environment with the Area which will not be a blighting influence on surrounding neighborhoods."

Thus, AKRF was tasked with reconciling the goals of redevelopment with the actual conditions as they existed in both the ATURA and non-ATURA properties at the time the study was conducted.

In my view, the petitioners are correct in asserting that the blight study failed to comport with the majority of the specific criteria set out in AKRF's contract. Furthermore, ESDC's contention that "as a matter of law," ESDC could only look at conditions contemporaneous with the study, which was conducted years after the announcment, is ludicrous on several levels.

Initially, it should be noted that ESDC offers no legal support for that claim other than the obvious point that ESDC is permitted by statute to revitalize blighted areas. Second, ESDC's contract with AKRF as described above, clearly contemplated that

AKRF would analyze both assessed value *trends* and current economic activity at the site and surrounding area. Finally, the obvious point raised by petitioners and dismissed by ESDC is that if the non-ATURA properties were in the midst of an economic revival, it would be counter to ESDC's mandate to step in, stop all productive development, and, in partnership with a private enterprise, develop the neighborhood according to its own vision of urban utopia, complete with professional basketball for the masses.

It is undisputed that the record contains several examples of redevelopment in this area that occurred prior to the announcement of the Project. In 2002, the Spalding Factory across from the Vanderbilt Yards was converted into 21 loft condominiums; Newswalk, a 137-unit luxury condominium building opened in the former Daily News printing plant; and the Atlantic Art Building opened with 31 luxury condominium units in 2003. Other developers in the area have also filed plans with the Buildings Department for conversion of space from industrial to housing. This rapid, private residential redevelopment of the area was commonly known and publicly reported in newspapers and periodicals. Even after the ESDC's announcement of the Project, surrounding property values continued to climb with townhouses selling for as much as $1.5 million last year. Newswalk, whose market value is high whether through direct purchase or eminent

domain, has been carved out of the Project's plan.[2]

Were this redevelopment more expansive and pervasive in the non-ATURA area, the petitioners would carry the day. Unfortunately for that position, FCRC's purchase of a significant portion of the non-ATURA area as well as many other dilapidated properties still held in private ownership and set out in the record supports, by the barest minimum, the agency's determination of blight. It is clearly within the agency's expertise to consider the effect of FCRC's conscious decision to allow its properties located within the non-ATURA area to lay fallow.

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[2]Should EDSC be able to take the properties within the scope of the Project by eminent domain, the condominium units at the former Spalding Factory and the Atlantic Art Building, located on the same block, will be demolished.

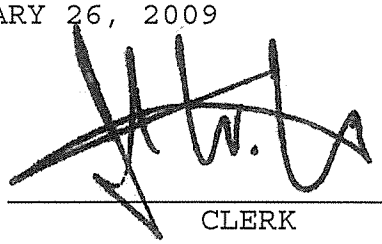
While I deplore the destruction of the neighborhood in this fashion, I cannot say, as a matter of law, that the ESDC did not have sufficient evidence of record to find "blight."

M-4100 - ***In re Develop Don't Destroy (Brooklyn), et al., v Urban Development Corporation, etc., et al.,***

Motion seeking leave to file reply appendix granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Saxe, Sweeny, Catterson, DeGrasse, JJ.

4627-
4628 Wells Fargo Bank, N.A., etc., Index 601562/05
Plaintiff-Appellant,

-against-

Zurich American Insurance Company, etc., et al.,
Defendants-Respondents.

Proskauer Rose LLP, New York (Edwin M. Baum of counsel), for appellant.

Donovan Hatem LLP, New York (Mitchell Rose of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 10, 2007, after a nonjury trial, inter alia, dismissing the complaint, unanimously affirmed, without costs.

We agree with the trial court that Wells Fargo failed to carry its burden of establishing entitlement to the payment it seeks under the "Creditor Reimbursement for Environmental Damages Insurance" policy issued by Lumbermens Mutual Casualty Company. Notwithstanding Wells Fargo's insistence that, under policies such as this, payment is due by virtue of the borrower's default, this particular policy covers -- in the event of a default -- loss to the collateral value of the gas stations at issue *due to an "environmental incident" as that term is defined in the policy*. Contrary to Wells Fargo's contention, the trial court

correctly construed the terms of the policy in concluding that pollution conditions that were already known before the policy period and remained unchanged during the life of the policy did not constitute an environmental incident. Moreover, only upon timely receipt of proper notice that such an environmental incident had occurred, as well as that the borrower had defaulted, would Lumbermens be obligated to pay the lesser of the loan balance, the fair market value of the collateral at the time of the loan, or the estimated cleanup costs (*see* Insurance Law § 1101[a]; *Adorable Coat Co. v Connecticut Indem. Co.*, 157 AD2d 366, 369 [1990]).

As the trial court found, Wells Fargo failed to give timely and proper notice of the requisite environmental incidents and failed to prove that it discovered, during the policy period, an environmental incident at four of the covered locations. It also failed to satisfy its burden of proof in establishing the collateral value loss.

The court's sua sponte reversal at trial of its earlier order granting summary judgment to Wells Fargo as to liability on the breach of contract claim does not warrant reversal (*see Ungar v Ensign Bank*, 196 AD2d 204, 208 [1994]). While in the summary judgment motion Wells Fargo asked for a declaration that it was entitled to coverage under the policy, the papers submitted in support of the motion did not establish the type of notice

necessary to justify such a declaration. Proper notice is a prerequisite to an insurer's liability, and the failure to establish it, as a matter of law, constitutes a failure to demonstrate grounds for summary judgment on the issue of liability (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]). Wells Fargo merely established that by letter dated August 22, 2002, Orix gave notice of the borrower's default in which it indicated, without *any* particulars, that the properties in question "may have been impacted by releases of petroleum hydrocarbons into the soil and groundwater from underground storage tanks." While the fact of that "notice" was uncontroverted, its content lacked any of the types of particulars that would qualify it as proper notice of a claimed environmental incident as required by the policy.

Notably, in deciding the summary judgment motion, the court did not address the issue of proper timely notice. The issue it addressed related to Wells Fargo's right to seek relief, based on the assertion that Lumbermens had recognized the REMIC Trust's insurable interest and valid assignment of the policy.

The law of the case rule prohibits a judge or court from modifying a ruling on the merits made by a judge or court of coordinate jurisdiction (*see Matter of Haas*, 33 AD2d 1, 7-8 [1969], *lv denied* 26 NY2d 842 [1970]). Yet, it has been said that "[e]very court retains a continuing jurisdiction generally

to reconsider any prior intermediate determination it has made" (*Aridas v Caserta*, 41 NY2d 1059, 1061 [1977]). The trial court's reconsideration of Lumbermens' liability under the contract would appear to fall under the latter category, but, even if the law of the case rule precluded the court from altering an earlier, erroneous grant of summary judgment on Wells Fargo's first cause of action, it has no binding force on appeal (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). The trial record establishes that Wells Fargo possessed a detailed spreadsheet dated August 2002 with particulars of dates and locations of contamination for six of the seven sites at issue, and had sufficient particulars as to the seventh by October 2003. Thus, it is apparent that timely proper notice could have been, but was not, given to Lumbermens, and the holding that Lumbermens was liable as a matter of law to pay under the policy would have been reversed by this Court in any event.

The evidence Lumbermens offered at trial on the issue of notice was properly admitted, since the issue of notice had remained relevant to a determination of damages. Moreover, nothing in the record established any waiver by Lumbermens of the defense of untimely notice; nor was its disclaimer untimely.

In view of the evidence that Wells Fargo possessed information about six of the sites at issue as early as August 2002 but failed to disclose this information to Lumbermens until

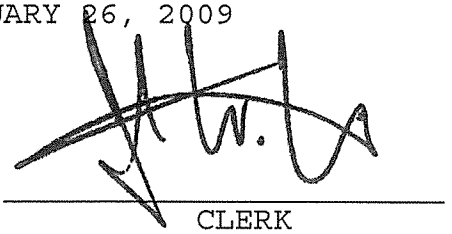
well after commencement of this action, and had information about the seventh in October 2003 that it failed to disclose to Lumbermens for almost a year, the trial court correctly found that Wells Fargo failed to provide timely and proper notice (*see Republic N.Y. Corp. v American Home Assur. Co.*, 125 AD2d 247 [1986]; *Ogden Corp. v Travelers Indem. Co.*, 924 F2d 39, 43 [2d Cir 1991]).

Even if we concluded that the notice issue was not dispositive, we would nevertheless uphold the dismissal because we agree with the trial court that Wells Fargo failed to prove its damages. To satisfy its burden, Wells Fargo had to establish, through admissible evidence, values for each of the three different measures of loss, since the court could not determine from Wells Fargo's evidence the loss created by the relevant environmental cleanup costs. Even if the court erred in striking Wells Fargo's expert testimony in connection with those environmental cleanup costs (*see Santariga v McCann*, 161 AD2d 320, 321-322 [1990]), we agree with the trial court that the proffered testimony was speculative and could not successfully establish such costs (*see Pember v Carlson*, 45 AD3d 1092, 1094 [2007]). We find no evidentiary support in the record for Wells Fargo's contention that Lumbermens breached the contract by failing to negotiate on the cleanup costs at the covered locations.

We have considered Wells Fargo's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Mazzarelli, J.P., Saxe, Catterson, Renwick, Freedman, JJ.

4699 The People of the State of New York, Respondent, Ind. 4061/06

-against-

Kenneth Albright, Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ryan Malkin of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 10, 2007, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 5 years, reversed, on the law, and the indictment dismissed.

The jury's verdict that defendant was guilty of second-degree burglary by entering a "bike room," which he was not authorized to enter, as opposed to a "pump room," which he was authorized to enter, was not supported by sufficient evidence, so the "unlawful entry" element of the crime was not proved beyond a reasonable doubt. Accordingly, we reverse the judgment of conviction and dismiss the indictment.

The evidence at trial established the following: defendant was an employee of a subcontractor which had been hired in August 2003 to service the air conditioning of a doctor's office on the

first floor of a co-operative apartment building. To perform that work, defendant and his co-worker, Vasilios Kalabakas, were authorized to enter the "pump room" in the basement, but were not authorized to enter the room in which residents stored their bicycles, which was located about eight feet down the hallway from the pump room. While standing on the sidewalk in front of the building, the superintendent saw defendant leave the building carrying a black bag and place it in his employer's van. The superintendent became suspicious, went into the pump room, and found defendant and Kalabakas there, along with another bicycle, which had been partially placed in another black bag. He next checked the bicycle room and found that two bikes were missing.

The building had a security camera trained on part of the basement hallway that did not capture the entrances to the pump and bicycle rooms. The camera showed defendant carrying the black bag down the hallway towards a service door which led to the street. After leaving the building, defendant and Kalabakas went to the apartment of a woman that both of them knew. She testified that when defendant and Kalabakas arrived at her apartment, Kalabakas carried a bag which he left on her apartment terrace.

The standard for reviewing a conviction for the legal sufficiency of the evidence adduced at trial is "whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (*People v Calabria*, 3 NY3d 80, 81 [2004] [internal quotation marks and citations omitted]). As is relevant here, a person commits second-degree burglary when "he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . the building is a dwelling." (Penal Law § 140.25[2]). For purposes of prosecution for burglary, generally a person will be deemed to enter or remain "unlawfully" in a building or dwelling when the person "is not licensed or privileged to do so." (Penal Law § 140.00[5]). In this case, while the evidence may have established that defendant committed larceny by moving one bicycle from the pump room to his work van, a rational jury could not have found beyond a reasonable doubt that defendant entered the bicycle room, because the evidence just as fully supports the alternative theory that only Kalabakas (who was charged but not indicted) entered the room and moved the bicycles into the pump room before defendant moved one into the van.

The evidence may have established that defendant committed larceny or, to the extent that Kalabakas may have committed the burglary, that defendant acted in concert with him. However, the indictment only charged defendant with second- and third-degree burglary, and the People did not pursue an acting-in-concert

theory. The dissent's position that the jury was entitled to "infer from the evidence that because defendant carried the bicycle [from the pump room] to the van, it was he who initially removed it from the storage room" must be rejected. The evidence also established that it was Kalabakas who carried the bag containing the bicycle from the van into the apartment of their mutual acquaintance, where defendant and Kalabakas apparently intended to secrete it. A rational juror could have just as readily inferred from that evidence that Kalabakas had entered the bike room. Stated somewhat differently, the evidence failed to establish that either defendant or Kalabakas was the mastermind of the plan to steal bicycles, and thus more likely to take on a greater role in carrying out the scheme. Simply, there was no rational basis for the jury to infer that Kalabakas or defendant, and not the other, was the person who unlawfully entered the bike room. Accordingly, the judgment should be reversed because the evidence at trial was legally insufficient.

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

In my view, the verdict convicting defendant of burglary in the second degree was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The direct evidence that defendant was seen on the building security camera carrying the black bag containing a stolen bicycle down the hallway leading to the street clearly permitted the inference that was apparently drawn by the jury, namely, that it was defendant who unlawfully entered the building's bicycle storage room and removed the bicycle.

As the majority observes, the standard of review in determining the sufficiency of the evidence is whether the evidence, viewed in the light most favorable to the People, could lead a rational trier of fact to conclude that the elements of the crime had been proven beyond a reasonable doubt (*People v Rossey*, 89 NY2d 970, 971 [1997]). Here, the highly reliable evidence showing that defendant carried the stolen bicycle out of the building could prompt a rational trier of fact to conclude beyond a reasonable doubt that defendant had also removed that bicycle from the storage room.

Defendant's suggestion that it might have been his co-worker who took the first step of unlawfully removing the bicycle from the storage room, while possible, is not, in my view, an equally

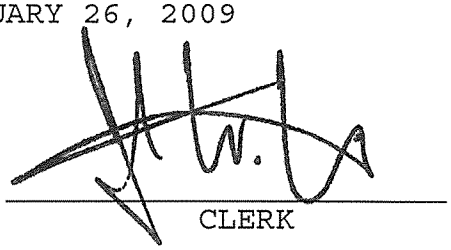
likely scenario, such as would preclude a finding against defendant beyond a reasonable doubt. The witness testimony that defendant's co-worker later carried the bicycle from the van to another individual's apartment does not render it equally likely that either of the two men could have been the one to take the bicycle out of the storage room, so as to necessarily create a reasonable doubt as to which man first took the bicycle. Moreover, it is quite possible that the witness's testimony could have been accorded less credence than that given by the jury to the videotape evidence, rendering an inference of defendant's guilt for the burglary far stronger. The nature of the evidence supporting some other inference simply did not eliminate the jury's ability to infer from the evidence that because defendant carried the bicycle the rest of the way to the van, it was he who initially removed it from the storage room.

Defendant failed to preserve any of his challenges to the court's response to a note from the deliberating jury that inquired about the legal status of a different part of the building, and in any event, the court gave a meaningful response to the jury's inquiry that correctly stated the law (*People v Almodovar*, 62 NY2d 126, 131 [1984]), and, in the context of the entire trial, it was made clear to the jury that the People had the burden of proving that defendant specifically entered the

bicycle-storage room. I would therefore affirm the conviction. I would also reject defendant's ineffective assistance of counsel claim relating to this issue.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5206 The People of the State of New York, Ind. 2063/06
Respondent,

-against-

McKinley Williams,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered September 25, 2007, convicting defendant, upon his plea of guilty, of two counts of criminal possession of a weapon in the third degree, and sentencing him to a term of 5 years' probation, unanimously affirmed.

Following the denial of a suppression hearing, defendant agreed to plead guilty as indicated, in full satisfaction of the indictment. During the plea proceeding in August 2007, defendant acknowledged the various trial rights that he was waiving, and that he was doing so after consulting with his attorney. He then admitted to possessing two weapons in the Bronx on May 2, 2006. The following colloquy ensued:

> THE COURT: The other thing I want to tell you is if you had gone to trial, even if you had a hearing in this matter, you would have had a right to an appeal. By taking this plea it's final, there's no appeal from this; understand?

DEFENDANT: Yes, sir.

THE COURT: This is something you want to do freely?

DEFENDANT: Yes, sir.

THE COURT: And in open court and you're saying to me Judge, this is it; is that right?

DEFENDANT: Yes, sir.

Defendant argues now that the purported waiver of his right to appeal was invalid and does not preclude review of the court's suppression decision, inasmuch as the court conflated the right to appeal with those rights automatically forfeited by pleading guilty. Defendant is correct. Although our independent review establishes that the search warrant was supported by probable cause, we write simply to focus attention on the recurrent fusing, during allocution, of the defendant's right to appeal (in this case, his right to appeal the order denying his suppression motion) with those rights waived by a guilty plea in cases where waiving the right to appeal is a condition of the plea bargain. To be sure, courts must inform defendants taking a plea of the rights waived by pleading guilty, such as the right to remain silent, the right to confront one's accusers and the right to a jury trial. In addition, however, courts must not only inform the defendants of their right to appeal, but must also elicit on the record that they are voluntarily, knowingly and intelligently

waiving it as a condition of taking the plea.

It is well settled that a defendant may waive the right to appeal as part of a bargained-for plea agreement (*see People v Kemp*, 94 NY2d 831[1999]), so long as the record demonstrates that it was made knowingly, intelligently and voluntarily (*see People v Muniz*, 91 NY2d 570 [1998]). Though a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual rights abandoned, it must make certain that the defendant's understanding of the terms and conditions of a plea agreement are evident on the face of the record (*see People v Callahan*, 80 NY2d 273, 280 [1992]). The record must establish, for example, that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty - the right to remain silent, the right to confront one's accusers and the right to a jury trial (*see People v Lopez*, 6 NY3d 248, 256-257 [2006]).

In the case at hand, defendant did not make a valid waiver of his right to appeal the suppression order since the court did not distinguish the appeal waiver from the rights automatically waived by the guilty plea, and effectively conflated them. After outlining the promised sentence to defendant, the court informed him of the rights automatically forfeited by his guilty plea,

including the right to a jury trial, to confrontation, to giving testimony, and to call witnesses on his behalf, which defendant stated that he understood. The court then instructed defendant that he would have had a right to an appeal had he gone to trial, and that by taking the plea, he was giving up that right. This was insufficient to demonstrate that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty and that the waiver was made knowingly, intelligently and voluntarily (*see e.g. People v Moyett*, 7 NY3d 892, 893 [2006] [court's advice to defendant that "by pleading guilty you give up your right to appeal the conviction" invalid for waiver]; *People v Boustani*, 300 AD2d 313, 314 [2002], *lv denied* 99 NY2d 612 [2003] [court's bare inquiry, "Now, you understand by pleading guilty you are waiving . . . your right to appeal; do you understand that," was insufficient to elicit an effective waiver]). Defendant should have been informed, for example, that a guilty plea does not, by itself, waive or foreclose review of an order denying a motion to suppress evidence (CPL 710.70[2]).

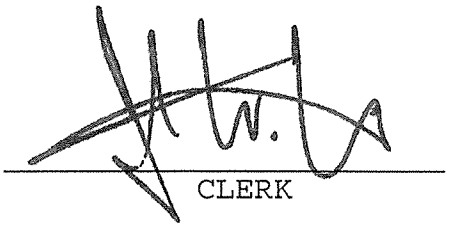
Furthermore, although defendant stated at the outset of the plea proceeding that he was satisfied with the services of his attorney, the court did not ask defendant if he had spoken with his attorney about the waiver of the right to appeal, and there

was no written waiver. Finally, at sentencing, defendant was informed of his right to appeal and neither the People nor defense counsel mentioned that defendant had waived his right to appeal.

Nevertheless, upon our in camera review of the search warrant materials, including the affidavit in support of the warrant application and the testimony of the confidential informant before the issuing court, we are satisfied that there was probable cause to issue the warrant (*see People v Castillo*, 80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]; *People v Edwards*, 1 AD3d 277 [2003], *lv denied* 1 NY3d 627 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Andrias, J.P., Nardelli, Catterson, Acosta, DeGrasse, JJ.

5208 Heidi Diaz, et al.,
Plaintiffs,

Index 116735/04
591122/05

-against-

Lexington Exclusive Corp.,
Defendant-Appellant,

The New York City Transit Authority, et al.,
Defendants,

Lillian Goldman, et al.,
Defendants-Respondents.

- - - -

Jane Goldman, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Lexington Exclusive Corp.,
Third-Party Defendant-Appellant.

Gannon, Rosenfarb & Moskowitz, New York (Jason B. Rosenfarb of counsel), for appellant.

Thomas D. Hughes, New York (Richard C. Rubenstein of counsel), for respondents.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered September 26, 2008, which, to the extent appealed from, denied third-party defendant Lexington Exclusive Corp.'s motion for summary judgment dismissing the cross claims and third-party claim for contractual indemnification, unanimously reversed, on the law, with costs, the motion granted and such claims dismissed. The Clerk is directed to enter judgment accordingly.

The lease between the Goldman third-party plaintiffs, as

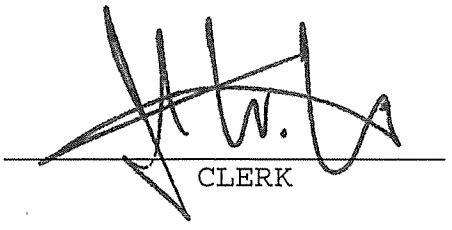
landlord, and Lexington, as tenant, requires the latter to procure liability insurance for the former's benefit. The Goldmans, who had obtained their own insurance as of the date of the subject accident, allege that Lexington breached the lease's indemnification clause insofar as it provides that the tenant "shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance." Lexington contends that the indemnification clause allows for the Goldmans' reimbursement under any insurance policy, including their own, in order for Lexington to be relieved of its contractual duty to indemnify. According to the Goldmans' construction of the clause, Lexington can be relieved of the duty to indemnify them only to the extent that it procures insurance for their benefit. In denying summary judgment, the IAS court found Lexington had failed to demonstrate that the lease unambiguously requires dismissal of the Goldmans' indemnification claim by reason of the fact that they have procured their own insurance. We find the court's conclusion erroneous.

Contrary to the IAS court's finding, "reimbursed by insurance," as used above, means just that, without regard to any specific source of coverage. "It is axiomatic that a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the *unequivocal language employed*

[emphasis added]" (*Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 [1961]). Courts should not strain to find contractual ambiguities where they do not exist (*Star City Sportswear v Yasuda Fire & Mar. Ins. Co. of Am.*, 1 AD3d 58, 60 [2003], *affd* 2 NY3d 789 [2004]). For example, in *Arteaga v 231/249 W 39 St. Corp.* (45 AD3d 320 [2007]), this Court found no ambiguity in a lease and dismissed a landlord's claim for indemnity under a provision that similarly obligated the tenant to indemnify the landlord solely for costs "for which Owner shall not be reimbursed by insurance" (*see also Wilson v Haagen Dazs Co.*, 201 AD2d 361 [1994]). We recognize that out-of-pocket expenses incurred in obtaining insurance are recoverable as damages for breaches of agreements to procure insurance (*see Inchaustegui v 666 5th Ave. Ltd. Partnership*, 96 NY2d 111 [2001]). The Goldmans' brief, however, makes it clear that they are not seeking such damages.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Saxe, McGuire, Moskowitz, Freedman, JJ.

5215 Howard B. Spivak Architect, P.C., Index 118165/06
Plaintiff-Appellant,

-against-

Henry Zilberman, et al.,
Defendants-Respondents.

Gogick, Byrne & O'Neill, LLP, New York (Kevin O'Neill of counsel), for appellant.

Weiss & Associates, PC, New York (Matthew J. Weiss of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered November 29, 2007, which, inter alia, granted defendants' motion pursuant to CPLR 3012(b) to dismiss the action for failure to timely serve a complaint, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded for further proceedings.

On December 7, 2006, plaintiff commenced this action to recover damages for breach of contract against defendants by filing a summons with notice. Approximately one week later, plaintiff's counsel mailed a "courtesy copy" of the summons with notice to defendants' counsel. A few days after the "courtesy copy" was mailed, defendants' counsel served on plaintiff's counsel a notice of appearance in the action. On January 11, 2007, just over three weeks after the notice of appearance was served, plaintiff's process server personally served defendant

Henry Zilberman with the summons with notice and served the same on defendant Susan Zilberman by deliver-and-mail.

On or about April 3, 2007, defendants moved to dismiss the action on the ground that plaintiff failed to serve its complaint. Defendants maintained that, because their attorney served a notice of appearance on December 18, plaintiff's time to serve its complaint had lapsed (CPLR 3012[b]). Approximately one day after defendants made the motion, plaintiff served defendants with the complaint. Additionally, plaintiff opposed the motion, and cross-moved for an extension of time to serve its complaint. Supreme Court granted the motion and denied the cross motion, finding that plaintiff failed timely to serve the complaint and that plaintiff was not entitled to an extension of time to serve it.

"If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand . . . If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance" (CPLR 3012[b]). CPLR 320(a) provides, in relevant part, that "[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer. An appearance shall be made

within twenty days *after service of the summons*, except that if the summons was served on the defendant . . . pursuant to section 303, subdivision two, three, four or five of section 308 . . ., the appearance shall be made within thirty days *after service is complete*" (emphasis added). As the Second Department has observed, "[n]o provision is made for an appearance or a demand for a complaint *before* the summons is served" (*Micro-Spy, Inc. v Small*, 9 AD3d 122, 124 [2004]).

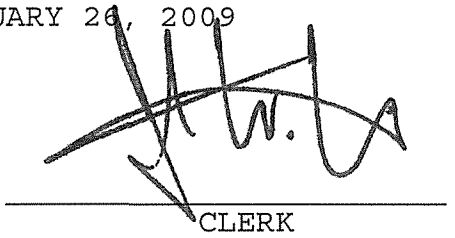
Here, under CPLR 320(a), service of the summons with notice on *defendants* triggered defendants' obligation to appear or answer the action. Because defendants did not answer or serve a notice of appearance after they were served with the summons with notice, plaintiff's time to serve them with the complaint did not begin to run. Concomitantly, plaintiff did not fail to comply with CPLR 3012(b) (*see Micro-Spy, supra*).

Contrary to defendants' contention, defense counsel's service of a notice of appearance did not trigger plaintiff's obligation to serve a complaint under CPLR 3012(b) ("If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance"). Because there is no evidence, indeed no claim, that defendants designated their attorney pursuant to CPLR 318 as their agent for service of process, defendants' attorney lacked authority to accept service

of process on behalf of defendants (*see Broman v Stern*, 172 AD2d 475, 476 [1991]). Accordingly, the notice of appearance that defendants' attorney served on plaintiff's attorney in response to the courtesy-copy summons with notice, and before defendants themselves were served with a summons with notice, was a nullity (*see Micro-Spy, Inc., supra* [defendant may not demand a complaint under CPLR 3012(b) before being served with a summons with notice]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5345 The People of the State of New York, Ind. 4009/06
Respondent,

-against-

Johann Becoate,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sheryl Feldman of counsel), for respondent.

Judgment, Supreme Court, New York County (Robert H. Straus, J.), rendered April 13, 2007, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 5½ years, unanimously affirmed.

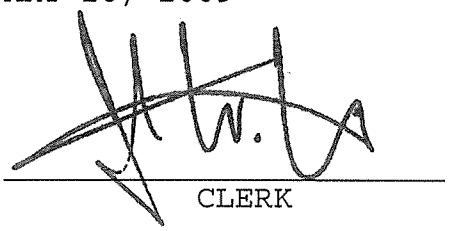
The court properly denied defendant's suppression motion. It is undisputed that, based on information that defendant may have been selling drugs, the police had at least a founded suspicion of criminality that entitled them to make a common-law inquiry. The record supports the court's finding that the police did not exceed the proper scope of such an inquiry. It was permissible for the officers, who did not draw their weapons, to approach defendant, follow him across a street, position themselves with one officer in front of defendant and the other behind him, direct him to stop, and ask him if he had anything on

him; none of this conduct elevated the encounter to a seizure requiring reasonable suspicion (*see e.g. People v Stevenson*, 55 AD3d 486 [2008]; *People v Joseph*, 38 AD3d 403, 404 [2007], *lv denied* 9 NY3d 866 [2007]; *People v Grunwald*, 29 AD3d 33, 38-39 [2006], *lv denied* 6 NY3d 848 [2006]). Defendant's admission that he possessed marijuana provided probable cause for his arrest.

In view of the foregoing, we find it unnecessary to decide whether the People's alternate theory that the police had reasonable suspicion justifying a seizure is properly before this Court.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5346 In re Oscar Cintron, Index 994/05
Petitioner-Appellant,

-against-

Judith A. Calogero as Commissioner of the Division of Housing and Community Renewal of the State of New York,
Respondent-Respondent.

BAS Legal Advocacy Program, Inc., Bronx (Randolph Petsche of counsel), for appellant.

Gary R. Connor, New York (Martin B. Schneider of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet, J.), entered January 5, 2006, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78 seeking, inter alia, to annul a final order of respondent (DHCR), dated February 16, 2005, insofar as it limited the rent overcharges recoverable by petitioner to the four years prior to the filing of the overcharge complaint, and limited treble damages to the two years prior to the filing of said complaint, unanimously affirmed, without costs.

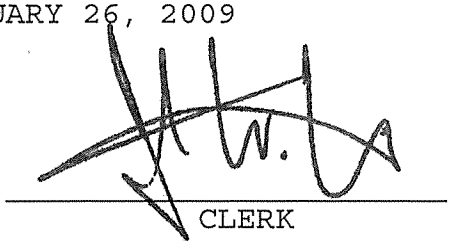
The order, finding the base rent date to be December 11, 1999 (four years prior to the filing of the overcharge complaint), establishing the legal base rent as the amount paid on that date, freezing that rent until February 1, 2004, during which time rent reduction orders were extant, and directing the

owner to refund overcharges collected from the base rent date inclusive of treble damages, was not arbitrary and capricious, and had a rational basis (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). While properly taking notice of the rent reduction orders even though they were issued more than four years prior to the filing of the overcharge complaint (*see Matter of Condo Units v New York State Div. of Hous. & Community Renewal*, 4 AD3d 424, 425 [2004], *lv denied* 5 NY3d 705 [2005]), DHCR appropriately limited the amount of rent overcharges recoverable to the four years prior to the filing of the overcharge complaint, and the amount of treble damages to the two years prior to the filing of said complaint (Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516[a][2]; *see Crimmins v Handler & Co.*, 249 AD2d 89, 91 [1998]).

We have considered petitioner's remaining contentions, including his premature request for attorney's fees, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5348 Miller Parra, Index 401755/05
Plaintiff-Respondent, 350319/04

-against-

Allright Parking Management, Inc., et al.,
Defendants-Appellants.

[And A Third-Party Action]

Fixler & LaGattuta, New York (Paul F. LaGattuta, III of counsel), for appellants.

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.), entered July 7, 2008, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing plaintiff's claims under Labor Law § 240(1) and § 241(6) and for common law negligence, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

The motion court improperly found that defendants (collectively Central) had the authority to control the capital improvements being performed in the garage owned by third-party defendant Triborough Bridge and Tunnel Authority (TBTA) and managed by Central. The Parking Management Agreement (PMA) between Central and TBTA does not give Central authority to

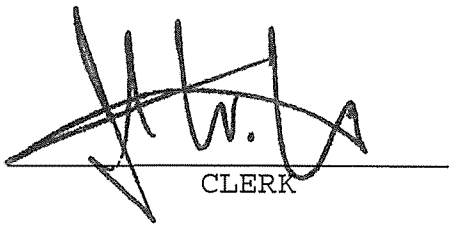
control the separate capital improvement work which TBTA alone contracted for, and for which TBTA hired a separate construction management company to oversee the project, which reported to TBTA, not Central. Rather, the PMA required Central to cooperate with TBTA's contractors and subcontractors on this project, not to control or supervise them. To the extent the PMA requires Central to supervise, report on, or initiate construction at the garage, it related solely to the operation of the garage, and its maintenance for that purpose. TBTA's own project manager testified without contradiction that this capital improvement work was outside of those responsibilities, and that Central had no responsibilities or authority relating to the work, except to coordinate the closing of certain parking spaces in areas where the work was being done. Accordingly, in the absence of any authority to control the work causing plaintiff's injury, Central may not be held liable under Labor Law § 240 or § 241(6) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Mahoney v Turner Constr. Co.*, 37 AD3d 377, 380 [2007]).

Plaintiff's claim sounding in common-law negligence should also have been dismissed, since Central's contract with TBTA was not so comprehensive and exclusive, as it related to the capital improvement work, to displace TBTA's duty to maintain the

premises in a safe condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140-141 [2002]; *Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5349 Arrowhead Golf Club, LLC, Index 109472/07
Plaintiff-Appellant,

-against-

Bryan Cave, LLP, et al.,
Defendants-Respondents.

Dollinger, Gonski & Grossman, Carle Place (Michael J. Spithogiannis of counsel), for appellant.

Bryan Cave LLP, New York (Howard M. Rogatnick of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 15, 2008, which granted defendants' motion to compel arbitration of plaintiff's claims and dismissed the complaint, unanimously affirmed, with costs.

The arbitration provision was enforceable, as evidenced by plaintiff's intent to be bound by the retainer agreements included therein (*God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371 [2006]). Plaintiff's adoption of those agreements as the basis for its claims signaled its intention to put this dispute to arbitration (*see McAlley v Boise-Griffin S.S. Co.*, 81 AD2d 771 [1981], *appeal dismissed* 54 NY2d 827 [1981]).

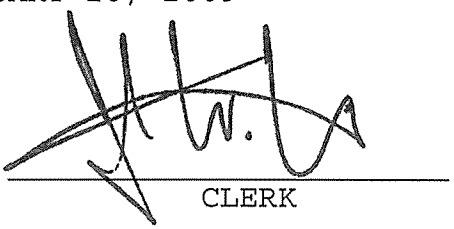
Contrary to plaintiff's suggestions, the arbitration provision was not unconscionable. The provision is clearly not the product of disparate bargaining power or deceptive language

in the contract, and there is no evidence that plaintiff lacked meaningful choice or was otherwise pressured into executing the engagement letters containing the provision (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988]; *Thies v Bryan Cave LLP*, 35 AD3d 252 [2006]).

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5350 Volt Management Corp. as assignee of Volt Viewtech, Inc., Plaintiff-Appellant, Index 101697/07

-against-

The City of New York, et al., Defendants-Respondents.

Mait, Wang & Simmons, New York (Robert Wang of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered December 13, 2007, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff claims that, as a victim of the underlying fraud crime, it is entitled to recover from defendants restitution paid by the nonparty criminal defendants under sentences imposed by the United States District Court for the Southern District of New York pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA) (18 USC § 3663A).

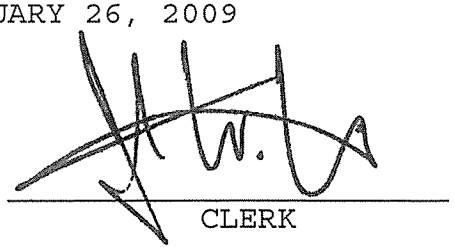
Restitution orders imposed in criminal proceedings "operate 'for the benefit of' the State [and] are not assessed 'for . . . compensation' of the victim" (*Kelly v Robinson*, 479 US 36, 53 [1986]). "Restitution undoubtedly serves traditional purposes of punishment" (*United States v Brown*, 744 F2d 905, 909 [2d Cir 1984], *cert denied* 469 US 1089 [1984]). A district court must

order restitution by defendants convicted of crimes identified in the MVRA even if their victims decline it (*United States v Johnson*, 378 F3d 230, 244 [2d Cir 2004]; 18 USC § 3663A[a][1]). "In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court" (18 USC § 3664[f][1][A]). Given the nature and purpose of criminal restitution orders, we agree with the motion court that plaintiff should have pursued its claim before the federal sentencing court. We note, moreover, that both in the brief and at oral argument, plaintiff expressly conceded that it is not seeking to recover under its contract with defendant Department of Environmental Protection and thereby implicitly conceded that it has no claim under the contract. These concessions undermine plaintiff's claim that the City defendants were unjustly enriched at its expense.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5351-
5351A Dennis Simone, et al., Index 110275/05
Plaintiffs-Appellants,

-against-

Gerald McNamara, et al.,
Defendants-Respondents.

Anita Nissan Yehuda, Roslyn Heights, for appellants.

Finder and Cuomo, LLP, New York (Matthew A. Cuomo of counsel), for respondents.

Amended judgment, Supreme Court, New York County (Marylin G. Diamond, J.), entered October 18, 2007, upon a jury verdict, in defendants' favor, unanimously affirmed, without costs. Appeal from prior judgment, same court and Justice, entered June 1, 2007, unanimously dismissed, without costs, as superseded by appeal from amended judgment.

We need not determine whether the trial court erred in refusing to redact that portion of the record from Sharon Hospital, in the "History of Present Illness" section, that states plaintiff Dennis Simone "jumped off his truck landing on hard turf/ice and rotated his ankle," before admitting the record in evidence. Nor need we determine whether plaintiff waived his contention that the trial court erred by belatedly seeking to strike the testimony concerning the record and seeking a curative instruction.

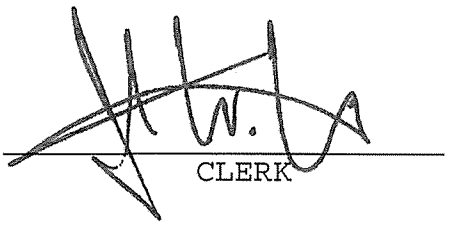
We find, in any event, that any error was harmless as a matter of law (*see* CPLR 2002). The statement was cumulative of other testimony adduced at trial tending to support defendants' contention that the injured plaintiff fell on the grassy area rather than on the gravel courtyard/parking area (*see Mashley v Kerr*, 63 AD2d 1084, 1085 [1978]). Whether he fell on the grassy area or on the gravel courtyard/parking area was not dispositive of defendants' negligence. Accordingly, there is no reason to believe the result would not have been the same if the evidence had not been improperly admitted (*see Barracato v Camp Bauman Buses*, 217 AD2d 677 [1995]).

We reject plaintiffs' contention that the court committed reversible error by including in the verdict sheet a special interrogatory asking the jury whether the injured party had slipped and fallen on ice in the grassy area or in the gravel courtyard/parking area. The trial court has broad discretion in deciding whether to submit interrogatories to the jury (*see* CPLR 4111(c); *Lunn v County of Nassau*, 115 AD2d 457, 458 [1985]). The court believed that the special interrogatory asking, at the outset, whether the accident occurred in the grassy area or in the gravel courtyard/parking area, would help the jury focus on the foreseeability and reasonableness elements that followed in the next interrogatory as to whether defendants were negligent in maintaining their property. Examining the propriety of the

verdict sheet's special interrogatory in the context of the court's charge (*see Szeztaye v LaVacca*, 179 AD2d 555 [1992]), we find the trial court did not improvidently exercise its discretion. Contrary to plaintiffs' contention, the special interrogatory, combined with the charge, did not mislead the jury into believing defendants' liability was contingent on the factual issue of where the accident took place. To the contrary, the court charged the jury that if it found defendants had not taken reasonable steps to maintain their property in a reasonably safe condition, it should proceed to the issue of liability for negligence regardless of whether the accident occurred on the grassy area or on the gravel driveway/courtyard area.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 26, 2009.

Present - Hon. David B. Saxe, Justice Presiding
James M. Catterson
James M. McGuire
Karla Moskowitz
Rolando T. Acosta, Justices.

The People of the State of New York,
Respondent,

Ind. 3907/03

-against-

5352

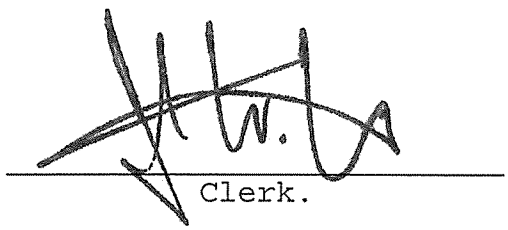
Baulino Garcia,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.) rendered on or about November 2, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTER:



Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department.

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5353 The People of the State of New York, Ind. 5326/02
Respondent,

-against-

Freddy Ortiz,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (John S. Moore, J. at hearing; Robert G. Seewald, J. at jury trial and sentence), rendered April 4, 2005, convicting defendant of manslaughter in the second degree, and sentencing him to a term of 5 to 15 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant asserts that his statements to a detective, and subsequently to an Assistant District Attorney, were products of a series of alleged Fourth Amendment violations. He claims that, without probable cause or a warrant, the police unlawfully entered his apartment, took him into custody, and detained him at a police station for an extended period of time. However, the record supports the hearing court's findings that, by means of a

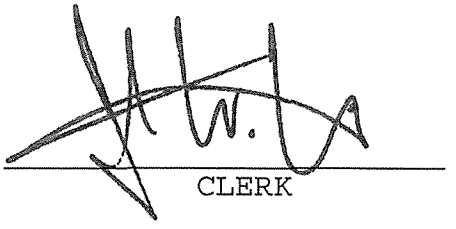
permissible ruse regarding their reason for wanting to speak to defendant (*see People v Williams*, 222 AD2d 721, 721 [1995], *lv denied*, 87 NY2d 978 [1996]), the police obtained defendant's grandfather's permission to enter the apartment and defendant's own agreement to accompany the officers to the precinct, where defendant remained voluntarily and was not detained until after he confessed. Even assuming defendant's grandfather ultimately revoked his consent to the police presence in the apartment, the police had already encountered defendant and obtained his agreement to depart with them. At the precinct, defendant remained unrestrained in an office-like interview room. The hearing court correctly determined that defendant was not in custody until after he confessed (*see People v Morales*, 42 NY2d 129, 137-138 [1977], *cert denied* 434 US 1018 [1978]). Regardless of their subjective intent, the police never conveyed to defendant that he was in custody, or that he was at the precinct for any reason other than to wait to be interviewed about an automobile accident. Given the totality of the circumstances, a reasonable innocent person in defendant's position would not have thought he had been seized by the police (*see People v Centano*, 76 NY2d 837 [1990]; *People v Yukl*, 25 NY2d 585, 590-592 [1969], *cert denied* 400 US 851 [1970]). Therefore, we reject defendant's claim that there was a continuing unlawful detention. We also conclude that defendant's confession to a detective and the

subsequent videotaped statement were attenuated from any possible violation of *Payton v New York* (445 US 573 [1988]) that may have occurred at the apartment (*see Brown v Illinois*, 422 US 590, 602-604 [1975]; *People v Harris*, 77 NY2d 434 [1991]).

The trial court's supplemental instructions on an issue relating to the voluntariness of defendant's statements, when read as a whole and in the context of the court's original instruction, conveyed the appropriate principles of law and provided adequate guidance to the jury. Thus, even assuming without deciding that the issue of whether the People proved attenuation beyond a reasonable doubt is properly one for the jury, defendant's challenge to the supplemental instructions is unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5354 Mahamadou Dembele, Index 24565/05
Plaintiff-Appellant,

-against-

Pedro A. Cambisaca,
Defendant-Respondent.

Antin, Ehrlich & Epstein, P.C., New York (Thomas P. Kinney of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered September 25, 2007, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met his prima facie burden by demonstrating that plaintiff had not suffered a serious injury within the meaning of Insurance Law § 5102(d) with, among other things, the affirmations of his orthopedist and neurologist (*see Brown v Achy*, 9 AD3d 30, 31 [2004]). Plaintiff's radiologist's affirmation, based on a March 2005 MRI, could not rebut defendant's orthopedist's findings of a resolved sprain, and no disability, based on a September 2006 examination (*see Thompson v Ramnarine*, 40 AD3d 360, 360-361 [2007]). Additionally, plaintiff's radiologist made no findings as to causation of the injury and did not link the torn meniscus to plaintiff's accident

(*see Otero v 971 Only U, Inc.*, 36 AD3d 430, 431 [2007]); *Medley v Lopez*, 7 AD3d 470 [2004]). At any rate, the existence of a partial meniscal tear, standing alone and with no evidence of any limitations caused thereby, is not sufficient to establish "serious injury" (*see Cornelius v Cintas Corp.*, 50 AD3d 1085, 1087 [2008]; *Medina v Medina*, 49 AD3d 335 [2008]). Moreover, even if substantiated, plaintiff's complaints that, among other things, his knee hurts when he drives or walks up more than four steps, do not constitute the loss of "substantially all" of his usual activities required to make a showing of serious injury.

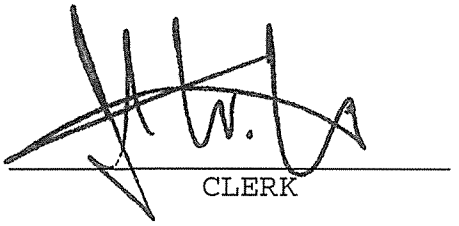
The affirmation of plaintiff's orthopedist also fails to raise an issue of fact as to permanent injury, as he does not explain the significance of his findings with respect to plaintiff's left knee's range of motion (ROM), or provide any comparison of his ROM findings with normal ranges (*see Otero*, 36 AD3d at 431). The orthopedist's conclusions are also inadmissible to the extent that they are based on the unsworn medical records and reports, since defendant's doctors did not submit copies of those unsworn papers with their reports, or expressly rely upon them in forming their own conclusions (*see Hernandez v Almanzar*, 32 AD3d 360, 361 [2006]).

Without any substantiating documentation or affidavit from the employer, plaintiff's vague and self-serving deposition testimony, that he did not return to work until "three or four

months" after the accident, does not suffice to show a "serious injury" for purposes of the 90/180 day rule (*see Burke v Torres*, 8 AD3d 118, 119 [2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5356 The People of the State of New York, Ind. 3262/06
Respondent,

-against-

Andrew Lopez,
Defendant-Appellant.

Robert S. Dean, Center for Appellation Litigation, New York (Mark W. Zeno of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered on or about March 19, 2007, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

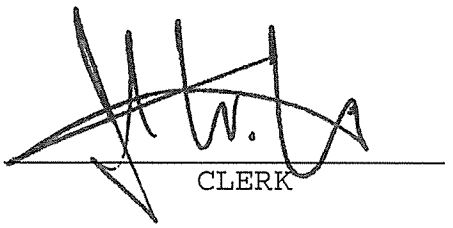
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5357-
5357A In re Perry Bellamy, Index 401463/98
Petitioner-Respondent,

-against-

The New York City Police Department,
Respondent-Appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for appellant.

Perry Bellamy, respondent pro se.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 30, 2008, which, in a proceeding pursuant to the Freedom of Information Law, insofar as appealed from, denied respondent Police Department's motion to vacate an order, same court and Justice, entered on or about November 27, 2007, directing respondent to produce certain documents without redaction, unanimously reversed, on the law, without costs, the motion granted, the November 27, 2007 order vacated, and the matter remanded to Supreme Court for further consideration of the exemptions from disclosure claimed by respondent. Appeal from the order of November 27, 2007 unanimously dismissed, without costs, as academic in view of the foregoing.

On a prior appeal (272 AD2d 120 [2000], *overruled in part Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]), we remanded this proceeding to Supreme Court with

instructions to conduct an in camera review of a certain DD-5 that respondent was withholding and of unredacted versions of documents that respondent had released, or indicated it would release, in redacted form. On remand, respondent submitted to the court unredacted copies of the documents in question, indicating the redactions it had made, and an affidavit from a FOIL-unit officer stating that the withheld information could identify individuals who spoke to the police in connection with the murder of which petitioner had been convicted in 1986. In April 2002, Supreme Court, at petitioner's request, removed the proceeding from its calendar without prejudice, in order to allow the Queens County prosecutor to investigate petitioner's claim of innocence. By order dated November 17, 2007, Supreme Court, responding to an October 2007 letter from petitioner that had not been served on respondent, restored the proceeding to its calendar, conducted in-camera review of the previously submitted documents, and directed disclosure of such documents without redaction, all without notice to respondent. Supreme Court stated that the information sought to be redacted was "very old," and therefore "probably" could no longer implicate the personal privacy, safety, and law enforcement concerns underlying the three statutory exemptions from FOIL's public disclosure mandate that respondent was claiming under Public Officers Law § 87(2)(b), (e)(iv), and (f). Respondent moved to vacate this

order pursuant to CPLR 2221. In the order entered April 30, 2008, the court stated that it was entertaining the CPLR 2221 motion because it had inadvertently failed to forward a copy of petitioner's letter to respondent, but that it was adhering to the November 27, 2007 order because respondent failed to adduce new evidence not previously known to the court or to show that the court had overlooked or misapprehended the facts or law. The latter order was properly appealed by respondent (*see Nedell v Sprigman*, 227 AD2d 163 [1996]).

The propriety of an exemption claimed under Public Officers Law § 87(2)(b) (unwarranted invasion of personal privacy) requires a court to first determine whether privacy interests are implicated by the type of information sought to be redacted (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 484-485 [2005]; if so, to determine whether release of the information sought to be redacted falls within one of the six examples of an "unwarranted" invasion of personal privacy set forth in section 89(2)(b); and, if not, to determine whether there is nevertheless any unwarranted invasion of privacy "by balancing the privacy interests at stake against the public interest in disclosure of the information" (*id.* at 485). The propriety of a FOIL exemption claimed under section 87(2)(f) (endangering the life or safety of any person) requires a court to consider whether the information sought to be redacted "could,

by its inherent nature, give rise to the implication that its release, in unredacted form, could endanger the life and safety of witnesses or have a chilling effect on future witness cooperation" (*Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 349 [1999]). The propriety of a FOIL exemption claimed under section 87(e)(iv) (law enforcement investigative techniques or procedures of a nonroutine nature) may be indicated by "a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel" (*Matter of Fink v Lefkowitz*, 47 NY2d 567, 572 [1979]).

While the age of information sought to be redacted can be relevant to these inquiries, age alone is not a sufficient basis for finding the above exemptions inapplicable. We note Supreme Court's statement that "despite the limited usefulness of [the redacted] information to the petitioner, he is, after 22 years still fighting for his freedom," and remind the court that "access to government records does not depend on the purpose for which the records are sought" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274 [1996]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009

CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5362 Marcia F. Russell, Index 6418/06
Plaintiff-Respondent,

-against-

Wayne A. Mitchell, et al.,
Defendants,

Daryl S. Paynter,
Defendant-Appellant.

Richard T. Lau & Associates, Jericho, (Keith E. Ford of counsel), for appellant.

Rubenstein & Rynecki, Brooklyn (Kliopatra Vrontos of counsel), for respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered July 14, 2008, which, insofar as appealed from as limited by the briefs, denied defendant-appellant's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment in favor of appellant dismissing the complaint.

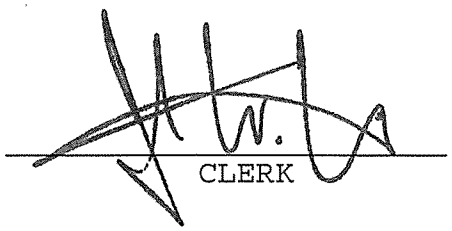
Appellant established a prima facie entitlement to summary judgment by submitting the affirmed reports of an orthopedic surgeon and a neurologist, who reviewed plaintiff's medical records, examined her and performed detailed and objective tests before concluding that plaintiff had full range of motion in her

cervical and lumbar spines and her shoulders, and that the sprain injuries she sustained had resolved (*see Lunkins v Toure*, 50 AD3d 399 [2008]). Appellant also submitted the affirmed reports of a radiologist, who determined that plaintiff's claimed injuries were not causally related to her accident, but rather were the result of a degenerative condition (*see Becerril v Sol Cab Corp.*, 50 AD3d 261 [2008]). Furthermore, appellant submitted plaintiff's deposition testimony, where she stated, inter alia, that she missed no work as a result of the accident.

Plaintiff's opposition failed to present evidence rebutting the findings of appellant's doctors, specifically the opinion of the radiologist that the growth shown on the MRI was a degenerative condition that had developed over time (*see Pommells v Perez*, 4 NY3d 566, 580 [2005]). Nor does plaintiff raise a triable issue of fact regarding her 90/180-day claim. As noted, plaintiff went back to work immediately following the accident, and her subjective claims of pain and of her inability to perform household chores are insufficient to raise a triable issue (*see Guadalupe v Blondie Limo, Inc.*, 43 AD3d 669, 670 [2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5363 Pedro Paniagua, et al., Index 16359/99
Plaintiffs-Respondents,

-against-

Bridge Food Center Corp.,
Defendant,

Rachel Bridge Corp.,
Defendant-Appellant.

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellant.

Raymond Schwartzberg & Associates, PLLC, New York (Raymond B. Schwartzberg of counsel), for respondents.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 23, 2008, insofar as it denied defendant Rachel Bridge Corp.'s cross motion for summary judgment dismissing the complaint and cross claims against it, unanimously reversed, on the law, without costs, and the cross motion granted to the extent of dismissing the complaint and cross claims as against Rachel Bridge. The Clerk is directed to enter judgment accordingly.

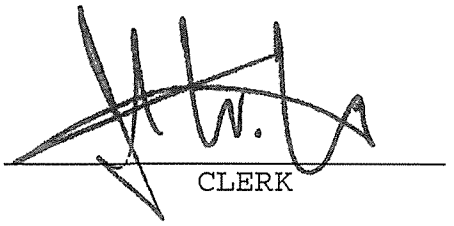
In this personal injury action, Rachel Bridge, the owner of the premises it leased to defendant Bridge Food Center, established its entitlement to judgment as a matter of law where plaintiffs failed to raise a triable issue of fact as to where the accident occurred or which party was responsible for correcting the alleged defect. The record demonstrates (and

plaintiffs do not dispute) that the injured party fell at the door saddle to the premises. Pursuant to defendants' lease, tenant Bridge Food Center was responsible for maintaining nonstructural defects and the sidewalk adjacent to the premises.

As an out-of-possession landlord, Rachel Bridge was not responsible for the maintenance of the door saddle, which was not structural in nature, and plaintiffs failed to cite any specific statutory violation (*see Belotserkovskaya v Café "Natalie,"* 300 AD2d 521 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Saxe, J.P., Catterson, McGuire, Moskowitz, Acosta, JJ.

5364 166 Archer Ave. Co., LLC, Index 602065/07
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation,
Defendant-Respondent.

Itkowitz & Harwood, New York (Donald Harwood of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered March 19, 2008, which granted defendant's motion for partial summary judgment dismissing the cause of action for breach of contract as untimely, unanimously affirmed, without costs.

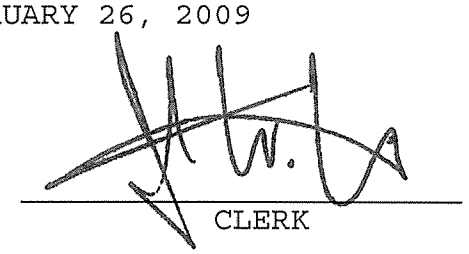
Since plaintiff's claim for construction costs accrued no later than 1994, this action commenced in 2007 was untimely (CPLR 213 [2]). Plaintiff's contention - that lease provisions conditioning plaintiff's right to payment upon substantial completion and acceptance of the work and providing that defendant "may audit" plaintiff's records to determine the reasonable amount of costs should be construed as requiring completion of an audit as a condition precedent to payment - is

unsupported (*see Grace Indus., Inc. v New York City Dept. of Transp.*, 22 AD3d 262, 263 [2005], *lv denied* 6 NY3d 703 [2006]; *see generally Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]) and cannot serve to toll the statute of limitations here. Nor is such condition imposed by the September 1997 letter from defendant's counsel, in light of both its language and the lease's merger clause. In view of the foregoing, plaintiff's claimed need for discovery provided no basis to forestall summary judgment.

We have considered plaintiff's remaining contention regarding the constructive rejection of its claim and find it unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on February 26, 2009.

Present - Hon. David B. Saxe, Justice Presiding
James M. Catterson
James M. McGuire
Karla Moskowitz
Rolando T. Acosta,

Justices.

In re Leonard Walker,
Petitioner,

Index 405373/07

5366
[M-95]

-against-

Hon. Lewis Bart Stone, etc., et al.,
Respondents.

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

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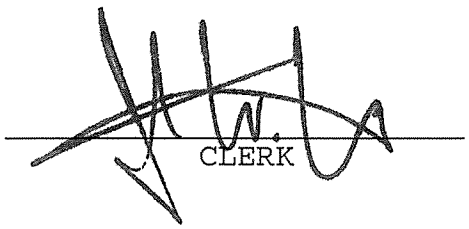


Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5367 The People of the State of New York, Ind. 5199/05
Respondent,

-against-

Kenneth Butler,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell, New York (Stephanie McCleery, of the California bar, admitted pro hac vice, of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Shelley R. Solomon of counsel), for respondent.

Judgment, Supreme Court, New York County (Eduardo Padro, J.), rendered August 8, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The undercover officer made a reliable identification of defendant, who matched a specific clothing description, and the evidence warrants the inference that defendant had an opportunity to divest himself of the prerecorded buy money between the transaction and his arrest.

The court properly exercised its discretion in admitting the

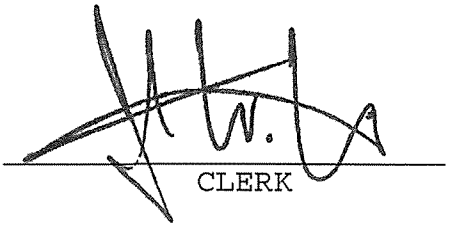
undercover officer's testimony that he approached defendant to inquire about buying drugs after hearing other persons nearby engage in an unspecified "narcotic-related conversation." This evidence was not offered for its truth, but for the legitimate non-hearsay purpose of completing the narrative and explaining why the police approached defendant (*see People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]). The fact that the conversation did not include or refer to defendant did not render it irrelevant for these purposes; on the other hand, the same fact minimized any potential for prejudice.

The court properly exercised its discretion in permitting the arresting officer to testify that in his experience, which encompassed hundreds of buy and bust operations, the inability of the police to recover prerecorded buy money from the person arrested in such an operation was "not uncommon." This simple, innocuous statement was essentially a statement of the officer's personal experiences, and it could not have caused any prejudice (*see People v Hooper*, 48 AD3d 292 [2008], *lv denied* 10 NY3d 864 [2008]). Given the limited nature of this testimony, which did not even directly express an opinion, the court was not obligated to make a formal inquiry into, and ruling upon, the officer's qualifications as an "expert"; in any event, the officer's qualifications were evident from his testimony regarding his experience.

Defendant's arguments concerning the absence of limiting instructions concerning the alleged hearsay and opinion testimony described above, and concerning a portion of the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5368-
5369 Addressing Systems and Products, Inc., et al., Plaintiffs-Appellants, Index 603747/06

-against-

George Friedman, et al., Defendants-Respondents.

Kaplan & Levenson P.C., New York (Steven M. Kaplan of counsel), for appellants.

Fenster & Kurland LLP, New City (Adam Keith Kurland of counsel), for respondents.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered November 28, 2007, which, insofar as appealed from, declared that the mutual liquidated damage provisions in the parties' stock purchase and non-compete agreement did not constitute unenforceable penalties, unanimously affirmed, without costs.

Plaintiffs, in challenging the liquidated damages provisions on the grounds that they constituted unenforceable penalties, did not meet their burden to show either that the damages flowing from a violation of the parties' mutual non-compete agreement were readily ascertainable at the time that the agreement was entered into, or that the liquidated damage amount provided for in the agreement was conspicuously disproportionate to the

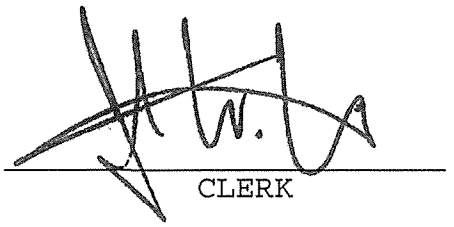
foreseeable losses (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380 [2005]). The amount of potential damages arising from a violation of the parties' mutual non-compete clause was not readily ascertainable at the time the agreement was entered into, as the interference with the parties' respective customers and resulting damages could not be reasonably determined. Plaintiffs did not present sufficient evidence from which it could be gleaned what amount of damages due to violations would be typical, or average, to establish with reasonable certainty what losses for a breach or breaches would have been foreseeable at the outset of the agreement. Plaintiffs' contention - that the liquidated damages were grossly misvalued - is predicated solely on the contrast between defendants' post-breach calculation of damages in this particular instance ($30,782) and the $158,333.33 liquidated damages figure, a standard which is without basis in the law (*see Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425 [1977]). The fact that a liquidated damages clause was designed to provide an incentive not to breach does not transform such provision "into a penalty merely because they operate in this way as well, so long as they are not grossly out of scale with foreseeable losses" (*Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006]). Here, plaintiffs have not presented sufficient proof to meet their initial burden to show that the fixed amount of liquidated

damages was plainly or grossly disproportionate to foreseeable probable losses.

Where, as here, the parties to the agreement were sophisticated business people, and the terms of the agreement were mutually negotiated, with each party represented by experienced counsel, a liquidated damages provision which is reached at arm's length is entitled to deference (*see e.g. Truck Rent-A-Center, Inc.*, 41 NY2d at 424).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5371 In re Shirley also known as
Cheryl C.-M. and Another,

Children Under the Age of
Eighteen Years, etc.,

Jose M.,
Respondent-Appellant,

The Administration for Children's Services
Petitioner-Respondent.

Howard M. Simms, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for respondent.

Tamara A. Steckler, Esq., The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

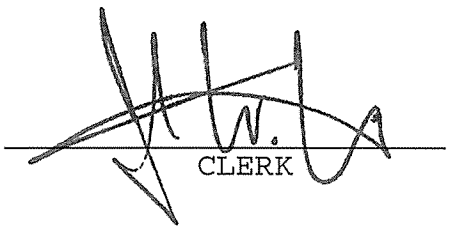
Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 25, 2007, which, after a fact-finding determination that respondent father sexually abused his child Shirley C.-M and derivatively neglected his child Melanie C.-M, released the subject children to the custody of their mother, unanimously affirmed, without costs.

The finding that the father sexually abused one daughter and derivatively neglected another daughter was supported by a preponderance of the evidence (Family Court Act §§ 1012 [e][iii], 1012 [f][i][B], 1046 [b][i]). The daughter's out-of-court statements were corroborated by a child sexual abuse expert, who, after evaluating the child, concluded that she had been abused.

Such corroboration included assessing the child's demeanor, intelligence, memory, language, the consistency of her statements, and the child's description and demonstration of the father's actions (*see In re Pearl M.*, 44 AD3d 348, 349 [2007]). The expert also ruled out two rival explanations for the daughter's claim of abuse, that she was coached, prompted or prepped to provide her statements, and that she invented the claim on her own as a means of removing her father from her house. No basis exists to disturb Family Court's findings of credibility (*see In re Nasir J.*, 35 AD3d 299 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



Tom, J.P., Andrias, Buckley, DeGrasse, JJ.

5373 Anthony J. Spinnell, Index 101921/07
Petitioner-Respondent,

-against-

JP Morgan Chase Bank, N.A.,
Respondent,

Philip Seldon,
Respondent-Appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan Uejio of counsel), for appellant.

Andrew J. Spinnell, respondent pro se.

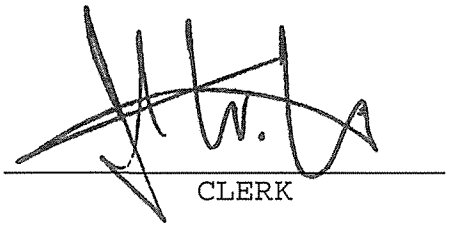
Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered February 5, 2008, confirming a Special Referee's recommendation that the corporate veil of debtor Birddog Associates be pierced and its assets applied to satisfy the judgment against defendant Seldon, unanimously affirmed, with costs.

The referee's report clearly defined and addressed the issues, resolved matters of credibility, and was supported by the evidence (*Gass v Gass*, 42 AD3d 393 [2007]), and it correctly applied the law. Contrary to appellant's contentions, the dummy corporation did not have to be named or served because it was defunct at the time of service of the restraining notice. The court properly applied New York law because there is no conflict

with Delaware law with respect to "reverse veil-piercing" (*see State of New York v Easton*, 169 Misc 2d 282, 288-290 [1995]), or the liability of an individual shareholder for fraud or acts taken in bad faith while a revived formerly tax-defunct corporation's charter was void (*see Lodato v Greyhawk N. Am., LLC*, 10 Misc3d 418 [2005], *affd* 39 AD3d 496 [2007]; *Frederic G. Krapf & Son, Inc. v Gorson*, 243 A2d 713, 715 [Del 1968]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5374 The People of the State of New York, Ind. 2875/05
Respondent,

-against-

Gabriel Martinez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered June 8, 2006, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 5 years, unanimously affirmed.

The court properly declined to submit to the jury the issue of whether one of the prosecution witnesses was an accomplice in fact, whose testimony would thus require corroboration (*see* CPL 60.22). Although the witness accompanied defendant and was present at the scene, defendant's theory under which the witness can be viewed as having participated in the shooting is based on speculative inferences, and is contradicted by the trial testimony. Even if, by discarding the weapon after the shooting, the witness acted as an accessory after the fact, this would not

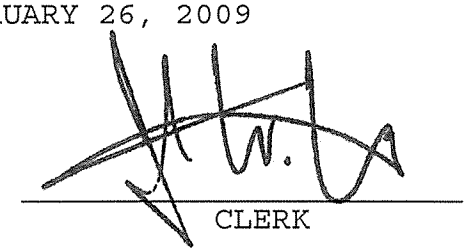
make him an accomplice within the meaning of the statute (*see People v Burgess*, 40 AD3d 322 [2007], *lv denied* 9 NY3d 921 [2007]; *People v Stanley*, 273 AD2d 132 [2000], *lv denied*, 96 NY2d 835 [2001]). In any event, any error in failing to deliver an accomplice corroboration charge was harmless (*see People v Gumbs*, 56 AD3d 345, 347-348 [2008]).

Defendant was not prejudiced by portions of the prosecutor's opening statement that set forth alleged hearsay evidence that ultimately did not come into evidence during the trial. The jury is presumed to have followed the court's instructions that opening statements are not evidence and that it was required to render a verdict based only on the evidence. In any event, the evidence at issue was generally admissible, not for its truth, but for legitimate nonhearsay purposes (*see People v Reynoso*, 2 NY3d 820 [2004]; *People v Tosca*, 98 NY2d 660 [2002]; *People v Rivera*, 96 NY2d 749 [2001]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5375 Carolyn R. Gaskin, Index 406954/07
Petitioner-Appellant,

-against-

Westbourne Associates, L.P.
Respondent-Respondent,

New York State Human Rights Commission,
Respondent.

Carolyn R. Gaskin, appellant pro se.

Kellner Herlihy Getty & Friedman, LLP, New York (Jeanne-Marie Williams of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered February 13, 2008, which dismissed the petition seeking to annul the determination of the New York State Division of Human Rights, unanimously affirmed, without costs.

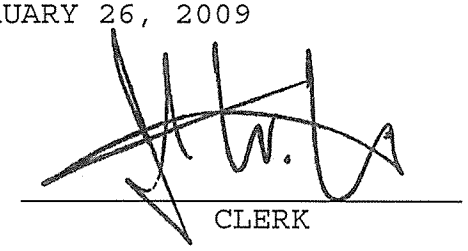
The petition challenging the Division's finding that there was no probable cause to support her claims that respondent Westbourne Associates, L.P. engaged in unlawful discriminatory practices related to housing based on petitioner's race/color, creed or sex (*see* Executive Law § 296 [5][a][2]) was properly dismissed for failure to allege facts sufficient to show that the

Division's determination was arbitrary and capricious (*see* *McFarland v New York State Division of Human Rights*, 241 AD2d 108 [1998]).

Petitioner's remaining arguments are unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5376 Magnum Real Estate Services, Inc., Index 107850/06
Plaintiff-Respondent,

-against-

133-134-135 Associates, LLC, et al.,
Defendants-Appellants.

Sills Cummis & Gross P.C., New York (Mark E. Duckstein of counsel), for appellants.

Coritsidis & Lambros, PLLC, New York (Jeffrey A. Gangemi of counsel), for respondent.

Order, Supreme Court, New York County (Helen E. Freedman, J.), entered May 8, 2008, which denied defendants' motion for partial summary judgment dismissing plaintiff's claim of ownership to certain real property, unanimously reversed, on the law, with costs, and the motion granted.

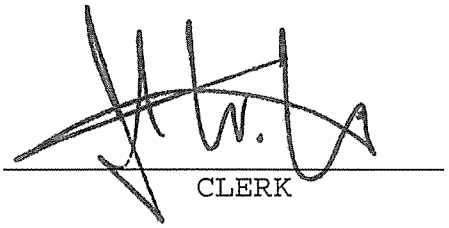
Plaintiff's claim of a 25% ownership interest in real property allegedly conveyed, not by or on behalf of a partnership that already existed between the parties, but by or on behalf of an entity created by defendants in which plaintiff had no interest, must be in writing or it is barred by the statute of frauds (*see Gora v Drizin*, 300 AD2d 139 [2002]; General Obligations Law § 5-703[3]). Here, there is no evidence that such a writing existed, and none of the documents contained in the record establish that plaintiff is entitled to an ownership interest in either the properties or in the entity to which the

properties were conveyed.

Furthermore, the record fails to establish the existence of a joint venture agreement such that plaintiff's claim is not subject to the statute of frauds (*see e.g. Walsh v Rechler*, 151 AD2d 473 [1998]). There is no indication of mutual control over the management and operation of the properties, nor is there an agreement to share the burden of losses (*see Needel v Flaum*, 248 AD2d 957, 958 [1998]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5377 Alicia Caicedo, Index 115655/05
Plaintiff-Appellant,

-against-

Cheven Keeley & Hatzis, et al.,
Defendants-Respondents.

Jaroslawicz & Jaros, LLC, New York (David Tolchin of counsel), for appellant.

Russo, Keane & Toner, LLP, New York (Thomas F. Keane of counsel), for respondents.

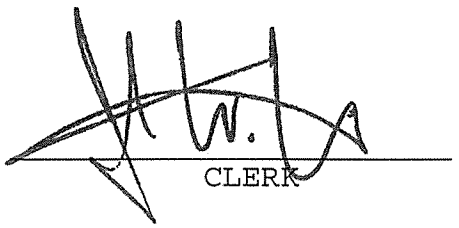
Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 8, 2008, which granted defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion denied and the complaint reinstated.

Defendants failed to establish their prima facie entitlement to judgment as a matter of law as they failed to make a prima facie showing that the condition complained of was not inherently dangerous (*see Salomon v Prainito*, 52 AD3d 803, 805 [2008]). An open and obvious hazard may negate the duty to warn, but it does not negate liability in negligence, because an owner still has a duty to ensure that its premises are maintained in a reasonably

safe condition (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2004]; *Cupo v Karfunkel*, 1 AD3d 48 [2003]). Here, there are factual questions as to both legal issues.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK

Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5378-
5378A Gabriella Nawi, Index 350105/05
Plaintiff-Respondent,

-against-

William Morgan Dixon,
Defendant-Appellant.

Philip Sherwood Greenhaus, New York, for appellant.

Dobrish Zeif Gross LLP, New York (Nina S. Gross of counsel), for respondent.

Order, Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered October 22, 2008, which, upon reargument, adhered to the prior order of the Supreme Court, New York County (Laura Visitación-Lewis, J.), entered July 15, 2008, granting the mother's motion for child care arrears in the amount of $8,175 and ordering the father to contribute to ongoing child care expenses pursuant to the terms of the parties' settlement agreement, and granted the mother's cross motion for attorney fees to the extent of directing the father to pay $2,500, unanimously affirmed, without costs. Order, Supreme Court, New York County (Laura Visitación-Lewis, J.), entered July 15, 2008, which, to the extent not superseded by the subsequent order, denied the father's cross motion for attorney fees, unanimously affirmed, without costs.

While the court stated that the father's motion for

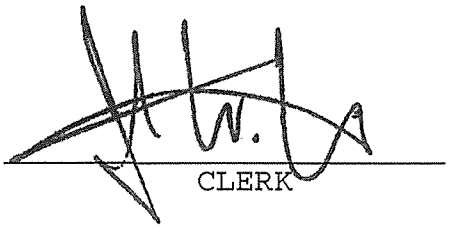
reargument was denied, the court considered the merits of the underlying motion and the mother's cross motion and adhered to the court's original determination with respect to the underlying motion. Thus, contrary to the mother's contention, the order is appealable as of right (*see* CPLR 5701[a][2][viii]; *see also 6645 Owners Corp. v GMO Realty Corp.*, 306 AD2d 97, 98 [2003]). Contrary to the father's contention, the stipulation was ambiguous with respect to when he had access to the child, and thus the court properly considered extrinsic evidence to determine the parties' intent with respect to child care costs and responsibilities on the father's days (*see generally Kurtz v Johnson*, 54 AD3d 904 [2008]). The father does not deny that he has access to the child after school on his scheduled days and it is undisputed that the nanny cares for the child until the father picks him up after work on those days; hence, the court properly determined that, under the terms of the parties' settlement agreement, the father is obligated to pay his pro rata share of the child care costs associated with the nanny's employment (*see generally id.* at 904).

The court properly granted the mother's cross motion for attorney fees since the mother, the prevailing party, was entitled to such fees pursuant to the default provision of the

parties' settlement agreement (*see Shanon v Peterson*, 38 AD3d 519, 519 [2007]). For this reason, the father's cross motion for attorney fees was properly denied.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5379 The People of the State of New York, Ind. 51686C/04
Respondent,

-against-

Unique K. Smith,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered on or about January 13, 2006, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

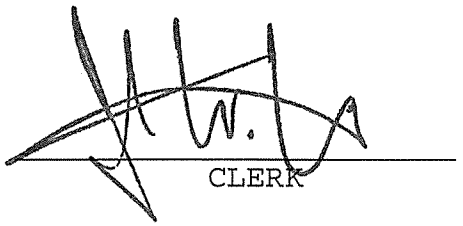
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5383 Manhattan Center for Early Learning Inc., et al., Plaintiffs-Appellants,

-against-

New York Child Resource Center, Inc., Defendant-Respondent,

Bilinguals, Inc., Defendant.

Index 118096/04

Yeskoo Hogan & Tamlyn, LLP, New York (Richard C. Yeskoo of counsel), for appellants.

Law Offices of Bruce Levinson, New York (Bruce Levinson of counsel), for respondent.

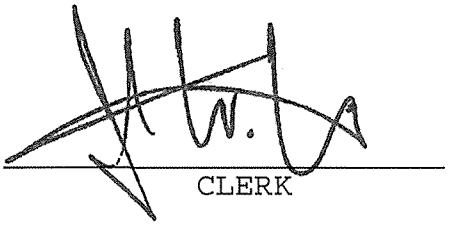
Judgment, Supreme Court, New York County (Rolando T. Acosta, J.), entered January 3, 2008, granting the motion of defendant New York Child Resource Center, Inc. for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated and the matter remanded for further proceedings.

The motion should not have been granted where the record shows that defendant deprived plaintiffs of an opportunity to obtain court-ordered depositions, at which plaintiffs may have been able to obtain helpful testimony (*see Nelson v Bestway Coach Express*, 36 AD3d 488 [2007]). Furthermore, although the complaint was sparse, plaintiffs' submissions in opposition to the motion raise triable issues of fact regarding their claim for

tortious interference with contract, including on the element of damages (*see Click Model Mgt. v Williams*, 167 AD2d 279, 280 [1990], *lv denied* 77 NY2d 805 [1991]; *see also Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5384 The People of the State of New York, Ind. 2120/07
Respondent,

-against-

Mariano Galarza,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Brigid Harrington of counsel), for respondent.

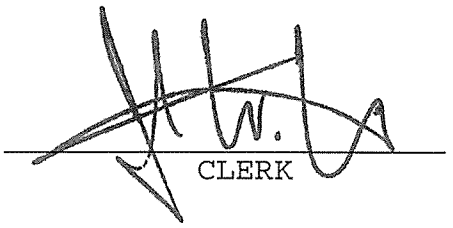
Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 13, 2007, convicting defendant, after a jury trial, of petit larceny and two counts of jostling, and sentencing him to an aggregate term of 2 years, unanimously affirmed.

The court properly exercised its discretion in admitting evidence of a prior incident bearing significant similarities to the charged crimes, including the use of juvenile accomplices to steal a woman's purse. This evidence was probative of defendant's intent and knowledge in both the larceny and jostling counts, as well as the absence of mistake in the jostling counts, and its probative value outweighed its prejudicial affect (*see People v Alvino*, 71 NY2d 233, 241 [1987]). "Evidence of uncharged crimes is not barred merely because the People are able to establish their case without it; they are entitled to present

all the admissible evidence available to them . . . There is ample case law to support the proposition that uncharged crime evidence may be used to support testimony that otherwise might be unbelievable or suspect." (*People v Steinberg*, 170 AD2d 50, 73-74 [1991], *affd* 79 NY2d 673 [1992][citations omitted]). Moreover, any such prejudice was minimized by the court's proper limiting instruction. Defendant's challenge to the instruction is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



Tom, J.P., Andrias, Nardelli, Buckley, DeGrasse, JJ.

5386N IRB-Brasil Resseguros S.A., Index 604449/06
Plaintiff-Respondent,

-against-

Portobello International Limited, et al.,
Defendants-Appellants.

Latham & Watkins LLP, New York (Joseph J. Frank of counsel), for appellants.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Sarah H. Yardeni of counsel), for respondent.

Order, Supreme Court, New York County (Herman Cahn, J.), entered on or about September 30, 2008, which granted plaintiff's motion to permanently enjoin defendants and others acting in concert with them from prosecuting or continuing to prosecute an action in Brazil, unanimously affirmed, with costs.

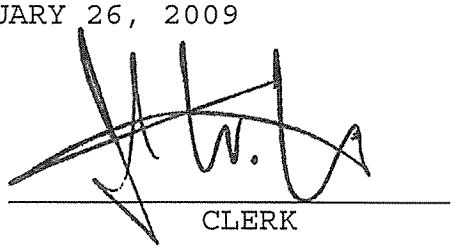
The court properly invoked its equity power to enjoin defendants from prosecuting the action they commenced in Brazil in about April 2008, in order to prevent the waste of judicial resources, unnecessary legal expenses, and duplicative litigation that might lead to conflicting results (*Jay Franco & Sons Inc. v G Studios, LLC*, 34 AD3d 297 [2006]). An injunction may be issued "where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying and harassing the party seeking the

injunction" (*Paramount Pictures v Blumenthal*, 256 App Div 756, 759 [1939], *appeal dismissed* 281 NY 682 [1939]). The instant action to collect on unpaid notes was properly placed in New York because the Global Note and related documents at issue explicitly provide that they are governed by New York law, and the parties agreed to submit to the jurisdiction of the courts of this state. This action was commenced in 2006, and defendants delayed commencement of their Brazilian action until about a year and a half later, which is evidence of their bad faith. Their motivation in that action was to avoid the application of New York law, which is yet another indication of bad faith. Since "a contrary decision in [the foreign court] would interfere with the New York court's ability to resolve the issues before it," it is entirely appropriate for the New York court to exercise its discretion to enjoin the action in the foreign court (*Interested Underwriters at Lloyd's v H.D.I. III Assoc.*, 213 AD2d 246 [1995]). Comity does not require our courts to defer to the foreign jurisdiction under such circumstances (*Certain Underwriters at Lloyds, London v Millennium Holdings LLC*, 52 AD3d 295 [2008]).

We have considered defendants' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
James M. McGuire
Rolando T. Acosta,

JJ.

Index 600177/03
402063/05

3260-3261

x

Fieldston Property Owners Association, Inc.,
Plaintiff,

-against-

Hermitage Insurance Company, Inc.,
Defendant-Appellant,

Chubb Group of Insurance Companies,
Defendant-Respondent.

- - - -

Hermitage Insurance Company, Inc.,
Plaintiff-Appellant-Respondent,

-against-

Fieldston Property Owners Association, Inc., et al.,
Defendants,

Federal Insurance Company,
Defendant-Respondent-Appellant.

x

In action No. 1, defendant Hermitage Insurance Company, Inc. appeals from an order of Supreme Court, New York County (Herman Cahn,

J.), entered August 10, 2006, which granted the motion of Federal Insurance Company for summary judgment dismissing the amended cross claims against it, and denied the cross motion of Hermitage Insurance Co. for summary judgment. In action no. 2, cross appeals from an order of the same court and Justice, entered January 25, 2007, which denied both Federal's motion and Hermitage's cross motion for summary judgment.

Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury (James F. Stewart and Jeffrey B. Gold of counsel), for appellant/appellant-respondent.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel) for respondent/respondent-appellant.

MCGUIRE, J.

This is a consolidated appeal in two declaratory judgment actions involving a dispute between two insurers, Hermitage Insurance Co., Inc. and Federal Insurance Co., over responsibility for the costs of defending their mutual insured, Fieldston Property Owners Association, Inc., and certain of its officers or directors (collectively, the Fieldston parties), in two actions that brought essentially the same set of claims alleging various wrongful acts and statements by officers or directors of Fieldston. The plaintiff in the first of the underlying actions is Chapel Farms Estate, Inc. Although nominally a distinct entity, the plaintiff in the second of the underlying actions is Chapel Hill.

Hermitage issued a "Commercial General Liability Policy" (the CGL policy) with an effective policy period of July 5, 2000 to July 5, 2001 and a per occurrence limit of liability of $1,000,000. The CGL policy is an "occurrence policy" that provides coverage for certain acts giving rise to liability occurring during the policy period. Pursuant to the policy, Hermitage provides coverage for "bodily injury," "property damage" and "personal and advertising injury" within the meaning of those terms as defined in the policy. Federal issued an "Association Directors and Officers Liability Policy" (the D&O

policy), having an effective policy period of February 13, 1999 to February 13, 2002 and a "per loss" limit of liability of $1,000,000. The D&O policy is a claims-made policy that provides coverage to Fieldston and its officers and directors, also insureds under the policy, for an array of "Wrongful Acts," a term broadly defined in the policy, as well as for losses relating to specified "offenses," a term defined to include, among other things, defamation, wrongful entry and eviction, provided the act or offense is committed during or before the policy period. Except to the extent that the "other insurance" clause may so provide, the D&O policy does not purport to be an excess policy. Federal also issued a "Commercial Umbrella Policy" (the umbrella policy), the particulars of which need not be detailed for the reason set forth below.

Hermitage communicated its position to Federal that only one of the eight causes of action, for injurious falsehood, in the first action might trigger its defense obligation. Although Federal did not dispute that its D&O policy provided coverage, Federal took the position that the D&O policy was excess to the Hermitage policy and refused for this reason to provide coverage for or contribute to the defense of the action. Consistent both with the settled principle that the duty to defend is broader than the duty to indemnify and with the obligation of an insurer

to provide a defense whenever there is "a reasonable possibility of coverage" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 67 [1991]), even when some of the claims asserted against its insured "fall outside the policy's general coverage or within its exclusionary provisions" (*BP Air Conditioning Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714 [2007] [internal quotation marks omitted]), Hermitage undertook the defense of the action subject to a full reservation of rights. With respect to the second action, Hermitage took the position that only 1 of the 21 causes of action, for injurious falsehood, in the original complaint, and only 1 of the 17 causes of action in the first amended complaint, also for injurious falsehood, might trigger its defense obligation. Although Federal conceded that at least some of the causes of action fell within the coverage provided by the D&O policy, Federal again took the position that the D&O policy was excess to the Hermitage policy and refused to provide coverage for or contribute to the defense of the second action. Hermitage once again undertook the defense of the second action subject to a full reservation of rights.

The first action was dismissed as to all defendants prior to the commencement of the second action. After this Court upheld the dismissal of certain of the causes of action in the first amended complaint in the second action, including the claim for

injurious falsehood (*Villanova Estates, Inc. v Fieldston Prop. Owners Assn., Inc.*, 23 AD3d 160 [2005]), Hermitage demanded that Federal assume the defense of the action and Federal complied.

Hermitage appeals from an order entered in each of the declaratory judgment actions relating to the respective obligations of the insurers in connection with the underlying actions. The first declaratory judgment action was brought by Fieldston against both insurers, and Supreme Court, by an order entered on August 10, 2006, granted Federal's motion for summary judgment dismissing the cross claims against it brought by Hermitage and denied Hermitage's cross motion for summary judgment seeking, among other things, a declaration that Federal is required to reimburse it, in whole or in part, for the defense costs it incurred in the first underlying action. In relevant part, Supreme Court concluded that Hermitage "was the primary insurer and Federal the excess insurer" with respect to that action because of the "other insurance" clause in Federal's D&O policy. The second declaratory judgment action was brought by Hermitage against Federal, and Supreme Court, by an order entered January 25, 2007, denied both Federal's motion for summary judgment dismissing the action and Hermitage's cross motion for summary judgment seeking, among other things, a declaration that Federal is required to reimburse it in full for the defense costs

it incurred in the second underlying action or, in the alternative, that Federal is required to contribute to those costs on an equitable basis. In relevant part, Supreme Court concluded that "neither party ha[d] demonstrated as a matter of law that the Federal policies are excess to the Hermitage policy" with respect to that action. In addition to the appeal by Hermitage, Federal cross appeals from the January 25, 2007 order.

In its main brief, Federal maintains that "there is no real dispute that the causes of action asserted in both [underlying] actions fell within the coverages afforded to Fieldston under both the Hermitage CGL policy and the Federal D&O policy." Of course, however, Hermitage has maintained from the outset -- and Federal does not contend otherwise -- that at most only one cause of action in each of the underlying actions falls within its CGL policy. Moreover, as noted earlier, Federal does not dispute that at least some of the causes of action asserted in both underlying actions fall within the coverage afforded by its D&O policy. Indeed, although Federal made clear at all times that its position was that the D&O coverage is excess to Hermitage's CGL policy, by a letter dated December 10, 2001, Federal informed Fieldston with regard to the first underlying action that "[i]n the context of this matter, coverage will be afforded to Fieldston"; by a letter dated January 6, 2004, Federal informed

Fieldston with regard to the second underlying action that "[i]n the light of the allegations of the ... Complaint, we will provide coverage for Fieldston ... for this matter." Accordingly, with the possible exception of the injurious falsehood claim asserted in both underlying actions, it is undisputed that the Hermitage CGL policy and the Federal D&O policy do not provide coverage for the same risks. Indeed, Federal expressly so conceded in one of its submissions to Supreme Court. Finally, it also is undisputed that certain of the causes of action are based on alleged wrongful acts by the Fieldston parties that occurred after the policy period of the Hermitage CGL policy but during the period in which the Federal D&O policy was in effect.

Although the coverage provided by its D&O policy otherwise is primary and at least some of the causes of action asserted in the underlying actions otherwise would trigger its defense obligation, Federal contends that it is relieved of any obligation to defend because of the "other insurance" clause in the D&O policy. This is so, Federal maintains, because the "other insurance" clause effectively renders it an excess insurer and Hermitage a primary insurer, which "has a duty to defend without any entitlement to contribution from an excess insurer"

(*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 456 [2005] [internal quotation marks omitted]). Accordingly, Federal's position entails the proposition that regardless of the number of claims asserted against one of its insureds that are covered under a policy providing primary coverage but containing such an "other insurance" clause, it is absolved of any obligation to defend its insured as long as the complaint in the underlying action includes even a single cause of action that falls within the coverage of another primary insurer's policy, regardless of whether it also falls within the Federal policy, and even though all the other causes of action fall outside the coverage of the other insurer's policy. Only if the single cause of action within the scope of the other insurer's policy is dismissed before the dismissal of all the other causes of action would Federal then be obligated to defend its insured.

Moreover, Federal thus would be absolved of its duty to defend regardless not only of the number of causes of action that fall within its policy but also of both the extent of the financial burden imposed on the other insurer in also defending these causes of action and of how unrelated the sole cause of action within the other insurer's policy is to all the other causes of action that are covered by Federal's policy. Federal

defends this position in part on the basis of the obligation of the other insurer to provide a defense even when some of the causes of action asserted against its insured "fall outside the policy's general coverage or within its exclusionary provisions" (*BP Air Conditioning*, 8 NY3d at 714). Of course, the other insurer might well contend that because the law imposes the same obligation on Federal, at the very least Federal also must defend the insured and that requiring Federal to do so is particularly appropriate when the bulk of the claims against the insured fall within only the Federal policy. Federal, however, seeks to avoid the force of this contention by arguing that the "other insurance" clause of its policy requires the conclusion that the obligation to defend uncovered claims is not a reciprocal one that it shares.

The anomalies inherent in Federal's position might well be of no moment if they were compelled by the terms of the "other insurance" clause. They are not. The clause reads as follows:

> "If any Loss arising from any claim made against the Insured(s) is insured under any other valid policies prior or current, then This policy shall cover such Loss ... only to the extent that the amount of such Loss is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits provided in th[is] policy."

Contrary to Federal's contention, it is irrelevant that

Hermitage's CGL policy is not "written only as specific excess insurance over the limits provided in the [D&O] policy." As Hermitage correctly argues, by its plain terms the "other insurance" clause applies only where a loss is insured under both the D&O policy and another "valid policy."[1] With the possible exception of the injurious falsehood claims, all the other losses (including defense costs) that could result from the other causes of action are not insured under the CGL policy but at least some of them are insured under the D&O policy. Accordingly, the "other insurance" clause is inapplicable to the risks of all other such losses, and the D&O policy thus provides primary coverage with respect to some of those risks. In other words, putting aside that possible exception, the CGL and D&O policies do not provide concurrent coverage as they do not insure against

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[1]To the extent Federal argues that the risks of loss relating to the causes of action that fall outside the scope of the CGL policy are "insured under" that policy because Hermitage is required to defend against them, that argument is meritless. The broad obligation to defend claims outside the scope of an insurer's coverage is an incident of the insurer's contractual obligation to provide a defense for other claims that are or may be within the policy (*see Fitzpatrick,* 78 NY2d at 68) and is a duty owed to the insured that is imposed for the benefit of the insured (*cf. General Motors Acceptance Corp.*, 4 NY3d at 456), not a coinsurer. Risks that an insurer must defend against on account of this broad duty are not thereby converted into risks that are covered by its policy.

the same risks (*see Federal Ins. Co. v Empire Mut. Ins. Co.*, 181 AD2d 568, 569 [1992] ["The law is well settled that where different insurers provide coverage for the same interest and against the same risk, concurrent coverage exists"]; *cf. Consolidated Edison Co. v Allstate Ins. Co.*, 98 NY2d 208, 223 [2002] ["other insurance" clauses "apply when two or more policies provide coverage during the same period"]).[2]

Although Hermitage should prevail on these appeals if only one of the causes of action in the complaints in the underlying actions other than the injurious falsehood claims is covered by the D&O policy and not by the CGL policy, as noted above Federal concedes that at least some of the other causes of action are covered by its D&O policy. Accordingly, Hermitage is entitled to contribution from Federal for Federal's equitable share of all the defense costs incurred by Hermitage, except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the CGL policy (*see General Motors Acceptance Corp.*, 4 NY3d at 457, [where, pursuant to the "other insurance"

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[2] As *Consolidated Edison Co.* makes clear, because the two policies do not provide coverage during the same period, they do not provide concurrent coverage for that additional reason. As noted above, moreover, Federal conceded that the two policies "are different policies designed to cover different risks."

clause in one insurer's policy it was excess to the other insurer's policy only as to the duty to indemnify, both insurers were "coincidental primary insurers" as to the duty to defend and each was required to contribute to the defense costs]; *cf. Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co*, 241 AD2d 427, 427-428 [1997], *lv dismissed* 91 NY2d 956 [1998] [where two insurers "insured a common obligation by providing successive coverage to their insured," the insurer that assumed the costs of defending the action was "entitled to recover from [the other insurer] its pro rata share of the defense costs"]).

Our decision in *Fireman's Fund Ins. Co. v Abax, Inc.* (12 AD3d 277 [2004]) provides compelling support for Hermitage's position. At issue in *Abax* was whether and the extent to which two insurers, Fireman's Fund and Zurich America, were responsible for defense costs and indemnity payments incurred in an underlying personal injury action against their mutual insured. We concluded that the "other insurance" clause in Fireman's policy did not apply to the claim against the insured so as to render Fireman's an excess insurer without any responsibility for the costs and payments. Although the terms of the "other insurance" clause are not set forth in our opinion, the record on appeal discloses that the terms of the clause are indistinguishable from the "other insurance" clause in Federal's

D&O policy. Specifically, the clause provided that "[i]f there is other insurance *covering the same loss or damage under this policy* ..., we will only pay for the amount of covered loss or damage in excess of the amount due from that other insurance" (emphasis added). The clause did not apply as it was included in the property section of the policy and the personal injury claim triggered coverage under other provisions of the policy. Accordingly, we held that the insurers "both provided primary coverage" and that as "coinsurers of the [insured] in the underlying personal injury action, [each] should share equally in the defense costs and indemnity payments" (*id.* at 278).

Persuasive additional support for Hermitage's position is provided by *NL Indus., Inc. v Commercial Union Ins. Co.* (935 F Supp 513 [D NJ 1996]). During a particular period of years, Commercial Union (CU) provided bodily injury coverage to the insured and Lloyd's provided property damage coverage (*id.* at 518). In the underlying "lead paint" actions, the insured defended against claims seeking to recover for both bodily injury and property damage. Construing New York law, the court rejected Lloyd's argument that because of an "other insurance" clause in its policies, its coverage was excess to CU's and thus it was not obligated to pay any portion of the defense costs for claims relating to the period in which both insurers' policies were in

effect. Like the "other insurance" clause in the D&O policy, the "'excess' or 'other' insurance clause in Lloyd's policies provide that coverage is secondary to coverage afforded by 'any other good, valid and collectible insurance inuring to the benefit of the Assured'" (*id.*). As the court observed, however, "Lloyd's 'excess' clause only applies 'with respect to loss or claims covered hereby.' Because [Lloyd's] policies cover only property damage, and CU's covers bodily injury exclusively, Lloyd's 'excess' clause is not triggered" (*id.*). In going on to conclude that CU could seek contribution from Lloyd's, the court reasoned as follows:

> "Th[e] difference between the duty to defend and the duty to indemnify requires that contribution for defense costs may be had even where the insurers in question do not provide coverage for the same risks. Indeed, it would be illogical, and inequitable, to deny CU its right to obtain contribution from Lloyd's where their respective duties to defend have been independently activated by different claims in the same underlying suits" (*id.*).

Although the lack of support for Federal's position in the terms of the "other insurance" clause is a sufficient basis for rejecting its position, other of its flaws should be noted. Acceptance of Federal's position would create an incentive for coinsurers like Hermitage in similar disputes to act inconsistently with their broad duty to defend the insured. After all, if Hermitage had refused to provide a defense rather

than respect its obligation to provide a defense even though certain of the claims asserted against Fieldston fell outside the scope of its CGL policy, it is at least conceivable that Fieldston may have brought a declaratory judgment against Federal alone, especially given that so many of the claims against it fall squarely within the scope of its D&O policy. In that event, Federal would have to seek contribution from Hermitage, rather than the other way around, and Hermitage would not in the meantime have incurred the costs of defending the underlying action. Moreover, to permit Federal to be a free rider here is particularly inappropriate given that it issued the D&O policy before the CGL policy was issued. Because Federal had no assurance that Fieldston would secure additional insurance that might overlap in coverage with the D&O policy, the premium Federal charged and accepted presumably reflected in part the potential costs of the broad duty to defend it had assumed under the policy.

Ironically, Federal seeks to use the broad duty to defend as a sword, wielding it not only against Hermitage but also using it to cut that same duty out of its policy, arguing that by defending the underlying actions Hermitage conceded that its CGL policy provided coverage. In undertaking to defend the actions, Hermitage conceded at most only a reasonable possibility of

coverage for at least one cause of action in each of the underlying complaints. Actually, Hermitage conceded nothing, for it provided a defense in each underlying action under full reservations of its rights (*see National Rests. Mgt. v Executive Risk Indem.*, 304 AD2d 387 [2003]).

In support of its position, Federal understandably relies on our decision in *Firemen's Ins. Co. of Washington, D.C. v Federal Ins. Co.* (233 AD2d 193 [1996]). Both Firemen's and Federal issued policies to the defendant in an underlying action and certain allegations of the complaint were covered by Firemen's policy and others by a D&O policy issued by Federal. On the basis of an "other insurance" clause in the Federal policy, this Court held that Federal's policy was excess to Firemen's policy and thus that Firemen's was not entitled to contribution from Federal for the costs of defending the insured (*id.*). Although the terms of the "other insurance" clause are not set forth in the decision, Federal cites to the record on appeal and correctly points out that its terms are identical to those of the "other insurance" clause in this case.

Hermitage argues that *Firemen's* is distinguishable principally because, unlike this case, it did not "involve[] a situation where many of the underlying acts and claims giving rise to the underlying suit occurred during times when one

insurer's policy was in effect, and the other insurer's policy was not." The broad duty to defend, however, requires an insurer to defend claims that are not within the scope of the policy it issues when another claim or claims may be. In terms of that duty, Hermitage provides neither any precedent nor any reason that would support distinguishing between claims falling outside the scope of a policy's coverage but arise from acts or claims that occur during the policy's effective period, and claims falling outside the scope of a policy's coverage because they arise from acts or claims that occur before or after the policy's effective period. It is far from obvious why an insurer need not defend against the latter class of claims when it must defend against the former. In any event, we refuse to follow our decision in *Firemen's* as it is not supported by the plain language of the "other insurance" clause in that case, and follow instead our more recent decision in *Abax* (12 AD3d 277) as it is in accordance with the plain language of the "other insurance" clause in this case, is consistent with *Consolidated Edison Co.* (98 NY2d 208), which was decided after *Firemen's*, and resolves these disputes between insurers in a more sensible fashion.

Hermitage's argument on this appeal that it demonstrated as a matter of law that Fieldston was not entitled to coverage for the injurious falsehood claims is without merit. In its brief,

Hermitage relies on allegations in Chapel Hill's complaints in each action that the false statements at issue were intentionally made, made with knowledge of their falsity and that the resulting damages were intended. As these allegations, if true, apparently would trigger exclusions in its CGL policy, Hermitage maintains that "given the[se] plain allegations of the [injurious falsehood causes of action], the Hermitage policy does not provide coverage for same." An insurer, however, cannot avoid its obligation to provide a defense by assuming the truth of allegations against its insured when it has actual knowledge of facts establishing a reasonable possibility of coverage (*Fitzpatrick,* 78 NY2d at 66-67, 69).

Finally, as noted above, Federal also issued an umbrella policy to Fieldston. Although Hermitage argued before Supreme Court and in its main brief that the terms of the umbrella policy provide an independent ground for the conclusion that it is entitled to contribution from Federal, it states in its reply brief that it withdraws its arguments concerning the umbrella policy if this Court agrees it is entitled to contribution under the D&O policy. Because we hold that it is entitled to contribution under the D&O policy, we need not address or resolve those arguments.

For the reasons stated above, we reverse that portion of the

order in the first declaratory judgment action granting Federal's motion for summary judgment dismissing Hermitage's cross claims and affirm that portion of the order in the second declaratory judgment action denying Federal's motion for summary judgment dismissing the action; and reverse those portions of the orders that denied Hermitage's cross motions for summary judgment and grant each motion to the extent of directing further proceedings to determine Federal's equitable share of the defense costs incurred by Hermitage (*see Atlantic Mut.*, 241 AD2d at 427).

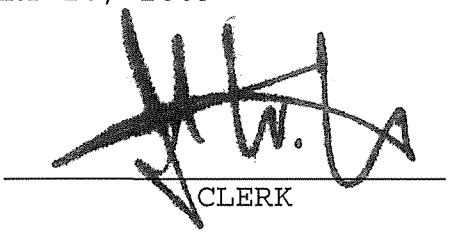
Accordingly, the order of Supreme Court, New York County (Herman Cahn, J.), entered August 10, 2006, which, in action no. 1, granted the motion of Federal Insurance Company, s/h/a Chubb Group of Insurance Companies (Federal), for summary judgment dismissing the amended cross claims against it, and denied the cross motion of Hermitage Insurance Co. for summary judgment, should be reversed, on the law, with costs, the motion denied, the cross motion granted, and it is declared that Federal is obligated to reimburse Hermitage for Federal's equitable share of the reasonable costs incurred by Hermitage in defending the Chapel Farms Estate, Inc. action (except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the CGL policy); and the order of the same court and Justice,

entered January 25, 2007, which, in action no. 2, denied both Federal's motion and Hermitage's cross motion for summary judgment, should be modified, on the law, Hermitage's cross motion granted, and it is declared that Federal is obligated to reimburse Hermitage for Federal's equitable share of the reasonable costs incurred by Hermitage in defending the Chapel Hill action (except for the costs Hermitage incurred in defending against the injurious falsehood claims if those claims are covered by both policies or are covered solely by the CGL policy), and otherwise affirmed, with costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2009



CLERK